88-2040

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GALEN NELSON - - - - - - Petitioner

versus

JEFFERSON COUNTY, KENTUCKY
ADDISON MITCHELL McCONNELL,
EDGAR G. HELM, JR.,
KENNETH GRAHAM, CHARLES TOPP,
DAVID WHALIN, KENNETH LAMPE
and JAMES FUCHS - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

What are minimally acceptable standards for federal courts that must attempt to apply state preclusion law in determining whether or not to dismiss federal constitutional claims prosecuted pursuant to 42 United States Code Section 1983 under the rules set forth in the cases of *Migra* v. *Warren City School District Board of Education*, 456 U.S. 75, 104 S.Ct. 886 (1983) and *University of Tennessee* v. *Elliott*, 106 S.Ct. 3229 (1986) ?

PARTIES TO THIS PROCEEDING

The Petitioner is Galen Nelson.

The Respondents are Jefferson County, Kentucky, Addison Mitchell McConnell, Edgar G. Helm, Jr., Kenneth Graham, Charles Topp, David Whalin, Kenneth Lampe, and James Fuchs.

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Parties to This Proceeding ii

Table of Contents ..... iii–iv

Table of Authorities ..... v–vi

Reports of Opinions Below 1

Grounds Upon Which the Jurisdiction of This Court Is Invoked 1– 2

Constitutional and Statutory Provisions Involved in This Case 2– 5

Statement of the Case 5–14

Argument 15–22

Conclusion 22–24

Certificate of Service 24

Appendix 1a–65a

Plaintiff's [Third] Amended Complaint, filed 3-12-86 ..... 1a–9a

Order of Jefferson County Police Merit Board, filed 5-18-84 ..... 9a–12a

Dissent to Above Order, filed 5-18-84 ..... 13a–14a

Findings and Order of Jefferson County Police Merit Board, filed 3-20-85 ..... 15a–21a

Memorandum and Order of the District Court, entered 4-4-86 ..... 22a–23a

Plaintiff's Response to Defendant's Renewed and Supplemental Motion to Dismiss, filed 10-30-86 24a

Order of the Jefferson Circuit Court, entered 6-30-86 43a

Order of the Jefferson Circuit Court, entered 7-14-86 44a

Affidavit of Galen Nelson, Plaintiff, executed 10-30-86 ..... 45a–46a

PAGE

Affidavit of Douglas W. Hawkins, executed 10-30-86 47a
Memorandum and Order of the District Court, entered 4-13-87 .....48a–52a
Opinion of the United States Court of Appeals, filed 6-16-87 .....53a–55a
Order of the United States Court of Appeals, filed 7-28-87 ..... 57a
Memorandum and Order of the District Court, entered 9-14-87 ..... 58a
Opinion of the United States Court of Appeals, filed 12-12-87 .....60a–64a
Order of the United States Court of Appeals, filed 3-14-89 ..... 65a

TABLE OF AUTHORITIES

Cases: PAGE

Bank of Shelbyville v. *People's Bank of Bagdad*, Ky., 552 S.W. 2d 234 (1977) 20

Barnes v. *McDowell*, 848 F.2d 725 (6th Cir., 1988)..17, 23

Blevins v. *Johnson*, Ky., 344 S.W.2d 875 (1961) ... 17

BTC Leasing Company v. *Martin*, Ky., App., 685 S.W.2d 191 (1985) 18

Buck v. *U.S. Aviation Underwriters, Inc.*, 763 F.2d 224 (6th Cir., 1984) 16

Citizen's Telephone Co. v. *Anderson*, Ky., 291 S.W.2d 517 (1956) 17

Department for National Resources v. *Stearns Coal and Lumber Company*, Ky., 563 S.W.2d 471 (1978) 20–21

Greater Cincinnati Marine Service Inc. v. *City of Ludlow*, Ky., 602 S.W.2d 427 (1980) 21, 22

Happy Coal Co. v. *Hartbarger*, 251 Ky., 779, 65 S.W.2d 977 (1933) 20

Migra v. *Warren City School District Board of Education*, 456 U.S. 75, 104 S.Ct. 886 (1983)....13–14, 15, 22, 23

Osborne v. *Bullitt County Board of Education*, Ky., 415 S.W.2d 60 (1967) 19

Philpot v. *Minton*, Ky., 370 S.W.2d 402 (1963) 16

University of Tennessee v. *Elliott*, — U.S. —, 106 S.Ct. 3220 (1986) 13, 15, 22, 23

Weaver v. *Anderson County Fiscal Court*, 648 F. Supp. 1575 (E.D., Ky., 1987) 21

Whittenberg Engineering and Construction Company v. *Liberty Mutual Insurance Company*, Ky., 290 S.W.2d 827 (1965) 16

Statutes:

PAGE

United States Constitution, Amendment 1 6
United States Constitution, Amendment 4 6
United States Constitution, Amendment 5 6
United States Constitution, Amendment 14 6
42 United States Code Section 1983 ..... 6, 7
Kentucky Revised Statutes 78.445 .....20, 21
Kentucky Revised Statutes 100.217, 100.221-100.261, 100.347 .....21, 22

Rules:

Rules of the Supreme Court of the United States 17.1(1) 23
Federal Rule of Civil Procedure 52 16
Kentucky Rule of Civil Procedure 52 16
1 Am. Jur. 2d Administrative Law, Section 70 (1962) 21

No.

IN THE

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October Term, 1989

GALEN NELSON - - - - - *Petitioner*

v.

JEFFERSON COUNTY, KENTUCKY,
ADDISON MITCHELL MCCONNELL,
EDGAR G. HELM, JR.,
KENNETH GRAHAM, CHARLES TOPP,
DAVID WHALIN, KENNETH LAMPE
and JAMES FUCHS - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this case was published at 863 F.2d 18. The opinion of the District Court was not published in any official or unofficial report known to the Petitioner.

GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the decree (opinion) sought to be reviewed is December 12, 1988. The date of the Court

of Appeals Order respecting a rehearing was entered on March 14, 1989.

The Petitioner believes that this Court has jurisdiction to review the opinion of the Court of Appeals by writ of certiorari under and by virtue of the provisions of 28 United States Code Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

United States Constitution, Amendment I

Congress shall make no law respecting and establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment IV

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceedings for redress.

Kentucky Revised Statutes 78.455

In all cases provided for in KRS 78.445 and KRS 78.450 [which permit the Chief of Police and the Merit Board, respectively, to discipline police Officers], the action of the chief or of the board shall be final except in the following cases:

(1) Every action in the nature of dismissal, suspension, reduction, or fine made by the chief, shall be subject to review by the board at the request of any officer or employee affected by KRS 78.400 to 78.460, and the board shall give notice and hold a public hearing with respect thereto, and in any case where, after such public hearing, a majority of the members of the board are of the opinion that the action of the chief is unjustified or unsupported by proper evidence, then the order of the chief may be set aside and revoked by the board and the board may impose such penalty or punishment as it may deem necessary and appropriate, if any.

(2)(a) Every action in the nature of dismissal, suspension, reduction or fine made by the board shall be final, except that any person aggrieved thereby may, within twenty (20) days after the rendition of such action appeal to the circuit court of the county in which the board meets. The board shall be named respondent as the county police force merit board, and service shall

be had on the chairman thereof. The appeal taken to the circuit court shall be docketed by the clerk thereof as a civil action and shall be tried anew, as if no action had been rendered by the board.

STATEMENT OF THE CASE

On September 24, 1982, the Petitioner, Galen Nelson, filed the lawsuit that is the subject of this petition in the United States District Court for the Western District of Kentucky against the respondents, officers of the Jefferson County Police Department, Jefferson County Government and the county itself (Record of the District Court, hereinafter "Record," Item 1). In it he alleged that the Respondents had twice suspended him for short periods from his position as a Jefferson County, Kentucky police officer and suspended his police powers in retaliation for his having:

1. Attempted to intervene in a Title VII lawsuit against Jefferson County and its police department;

2. Written a letter to the department's police chief in which he criticized the operation of the department's radio room, the incompetence of which had unnecessarily caused him to have to walk into a lake with his uniform on to insure that a swamped vehicle held no injured or dead persons; and

3. "Appealed" his discipline by the chief to an administrative agency known as the Jefferson County Police Merit Board.

On September 28, 1982, one of the Respondents, then county police chief Edgar Helm, fired Nelson from his position as a police officer. Nelson later amended his lawsuit to reflect his belief that his discharge was in retaliation for his having filed the lawsuit.

Nelson alleged that the retaliatory measures taken against him as outlined above were undertaken in derogation of his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

In his original and amended complaints, Nelson also alleged that the Respondents had forced him to undergo psychiatric treatment and otherwise violated his rights to privacy and free association as guaranteed by the First and Fourteenth Amendments to the United States Constitution. He further alleged that the Respondents had violated his rights to remain silent and have access to an attorney in the face of an investigation into his alleged criminal activities, in violation of his rights under the Sixth and Fourteenth Amendments to the Constitution. Finally, the Petitioner alleged that the Respondents had unlawfully seized his personal property and subjected him to an unreasonable search during the course of a departmental investigation into his affairs, in violation of his rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution.

Petitioner's lawsuit, of course, cited the Constitutional provisions set forth above and was filed pursuant to the provisions of 42 United States Code sec-

tion 1983. In its final amended form it is attached hereto at the beginning of the Appendix, at pp. 1a-8a.

After extensive discovery, Petitioner's case was set for trial on February 10, 1986. On February 5, 1986, however, the trial was postponed until April 7, 1986 (Record, Items 73 and 89).

On April 2, 1986, only five days before the scheduled trial of the case, the Respondents moved for summary judgment upon the purported bases of "res judicata" and qualified immunity (Record, items 99, 100, and 101; Item 101 was included in the Joint Appendix for the Court of Appeals, hereinafter the "Joint Appendix," at pp. 102-133). On April 4, 1986, after a brief hearing and without requiring the Petitioner to file any sort of formal response, the District Court denied the motions (Joint Appendix, pp. 134-135; This Brief, pp. 22a-23a).

Respondents then persuaded the District Court that its jurisdiction over the Petitioner's lawsuit against them was superseded by that of the United States Court of Appeals for the Sixth Circuit, to which they took an immediate interlocutory appeal of the District Court's denial of their claim of qualified immunity. On June 16, 1987, the Court of Appeals sustained the District Court's denial of Respondents' motion for summary judgment. The Court concluded ". . . that genuine issues of material fact exist as to whether the appellants committed the acts as alleged by Nelson," after a complete review of the record. (Joint Appendix, pp. 225-227; This Brief, pp. 53a-56a). On July 28, 1987,

the appellate court unanimously denied the Respondent's Petition for Rehearing and Rehearing *en banc.* (Joint Appendix, p. 224; This Brief, p. 57a).

Meanwhile, the Respondents had succeeded in persuading the District Court that certain papers on file with the Jefferson Circuit Court of the Commonwealth of Kentucky and the Jefferson County Police Merit Board constituted a complete bar to the continued prosecution of Petitioner's lawsuit against them under the doctrine of "res judicata."

The relevant papers advanced by the Respondents on this issue were the following:

a. A multi-page "Order" entered by the Board on May 18, 1984 (Joint Appendix, pp. 114-117; This Brief, pp. 9a-12a), with "dissent" by member Danny Plyler (Joint Appendix, pp. 118-119; This Brief, pp. 13a-14a);

b. A final report, styled "Findings and Order," entered by the Board on March 10, 1984 (Joint Appendix, pp. 127-133; This Brief pp. 15a-21a).

c. An Order of the Jefferson Circuit Court entered on June 30, 1986, dismissing Petitioner's appeal to it of the Merit Board's report adverse to him (Joint Appendix, p. 181; This Brief, p. 43a).

An examination of these papers reveals that at one point the Merit Board expressed disbelief of Petitioner's allegation that Respondent David Whalin had planted a marijuana pipe in Petitioner's van during a search of the van (Joint Appendix, p. 130; This

Brief, p. 18a). Otherwise, none of the Merit Board papers advanced by Respondents as somehow preprecluding Petitioner's federal lawsuit contained any but the vaguest and most general references to the claims raised in the lawsuit, as a brief analysis of them will conclusively show.

The Board's final report noted purported, ". . . constant allegations by the Appellant that his civil rights have been violated by the Chief and other officers throughout the Departmental investigation," of him (Joint Appendix, p. 132; This Brief, p. 19a). The final report stated that the Board had, ". . . rejected Appellant's claim of unconstitutional treatment or deprivation by Chief Helm or the Department in the investigation and administrative prosecution of this case," in its Order of May 18, 1984 (Joint Appendix, p. 132; This Brief, p. 20a), and concluded as follows:

> After due deliberation and careful consideration of the testimony and evidence on the merits of the case at the August 29-30, 1984 hearing in this case, the Board remains of the firm opinion that none of Appellant's Constitutional rights were violated by the investigation or administrative prosecution of this matter. The Board specifically finds, and is unanimous on this point, that the officers who participated in this case, as is reflected in all of the proceedings before the Board, acted in good faith and in a manner in which they believed to be lawful, proper, and necessary in view of all circumstances under which they were re-

quested to act (Joint Appendix, pp. 132-133; This Brief, p. 20a).

One persuing the final report of the Board for any specific consideration or analysis of the Constitutional claims raised in Petitioner's lawsuit would simply not find any such consideration. However, he might have some hope that such consideration or analysis had taken place in the Board's Order of May 18, 1984, given the reference to the earlier Order in the Board's final report set forth above. His hope would be misplaced. With the exception of the Board's conclusion in its May 18, 1984, report, that the Petitioner was not entitled to any of the Constitutional rights of a criminal suspect during the Respondents' investigation of him (Joint Appendix, p. 116; This Brief, pp. 10a-11a), this document contained *no discussion whatsoever* of Petitioner's federal claims or of any of his federal Constitutional rights. Instead, it contained only an analysis of Petitioner's rights under various Kentucky statutes designed to protect police officers that are the subject of departmental investigations (Joint Appendix, pp. 114-117; This Brief, pp. 9a-11a).

In response to the motion to dismiss upon the grounds of "res judicata," the Petitioner produced an Order of the Jefferson Circuit Court subsequent to the one advanced by Respondents. The subsequent order set aside the earlier Order and stated that the Court was dismissing Petitioner's appeal to it of the Merit Board's adverse action, "without prejudice to the substantial rights of any of the parties," instead

of simply dismissing the appeal, as the earlier Order had done (Joint Appendix, p. 182; This Brief, pp. 43a-44a). Despite some obvious confusion on the matter, both the federal District Court and the Court of Appeals for the Sixth Circuit conceded that the effect of the later Order of the Jefferson Circuit Court was to return, ". . . the appellant [Petitioner in this proceeding] to the same position he would have enjoyed if he had never exercised his right to appeal," the Merit Board's Orders to Jefferson Circuit Court (Opinion of the Court of Appeals; This Brief, p. 63a). They thereby accepted Petitioner's argument, as originally stated in his response to the Respondent's motion to dismiss his lawsuit, that the Merit Board's reports held the status *only* of judicially unreviewed administrative findings under Kentucky law (Joint Appendix, pp. 166-167; This Brief, pp. 27a-28a).

In addition to this one successful argument, the Petitioner made the following arguments in response to the Respondent's motion to dismiss his lawsuit upon the purported grounds of res judicata:

1. The motion simply ignored the Kentucky law of judgments, even though it was the Respondent's burden to show how that law justified the dismissal of Petitioner's federal lawsuit (Joint Appendix, p. 167; This Brief, pp. 28a-29a).

2. The Courts of Kentucky would likely not give preclusive effect to any actions of an agency such as the Merit Board because of its non-judicial nature

and some of the language of its enabling act (Joint Appendix, pp. 170-175; This Brief, pp. 29a-36a);

3. The Courts of Kentucky would not likely give preclusive effect to the Merit Board reports because there was no identity of subject matter between the proceedings before the Merit Board and Petitioner's federal lawsuit (Joint Appendix, pp. 175-176; This Brief, pp. 36a-38a);

4. The Kentucky Courts would not give preclusive effect to the Merit Board's reports because a comparison between them and the claims raised in Petitioner's federal lawsuit indicated that none of these claims, with possible minor exceptions, had actually been litigated and determined by the Merit Board (Joint Appendix, pp. 176-177; This Brief, pp. 38a-39a); and

5. The Kentucky Courts would not give preclusive effect to the Merit Board's reports because it would simply be unfair to say that Petitioner's federal Constitution claims were precluded by any papers issued by the Merit Board since the Board:

a. Acted upon a tie vote;

b. Included members who were appointed by defendants in Petitioner's federal lawsuit;

c. Included members who were direct subordinates of defendants in the federal lawsuit;

d. Had as its attorney a gentleman, N. Scott Lilly, who actively participated in its deliberations

and was also attorney of record for the defendants in the federal lawsuit; and

e. Had as its chairman a gentleman who had made no secret of his belief that the Board should always simply uphold the actions of the department's chief of police in disciplinary matters (Joint Appendix, pp. 178-180; This Brief, pp. 39a-41a).

Petitioner supported each of the arguments set forth with apt citations to the abundant Kentucky law of judgments in his Response to the motion to dimiss his lawsuit, which is appended hereto at pp. 24a-42a.

The Court opined that the Petitioner's lawsuit should be dismissed in a non-final Order on April 13, 1987.

In dismissing Petitioner's lawsuit, the District Court essentially ignored all of Petitioner's arguments and the Kentucky law of judgments. It held, without any discussion of either Petitioner's arguments or the Kentucky law of judgments that, ". . . *University of Tennessee* v. *Elliott*, — U.S. —, 106 S.Ct. 3220 (1986) directs this Court to give preclusive effect to the Merit Board's decision," adverse to Petitioner (Joint Appendix, p. 210; This Brief, p. 50a).

On May 21, 1987, Petitioner essentially moved the District Court to reconsider its opinion of April 13, 1987 upon the ground that the Court had, ". . . not attempted to apply Kentucky law to [the issue of preclusion] as it is required to do by the plain language . . ." of *Elliott*, *supra*, and *Migra* v. *Warren City*

School District Board of Education, 456 U.S. 75, 81, 104 S.Ct. 886, 892 (1983), and that Kentucky law did not justify the application of preclusion under the circumstances of this case (Joint Appendix, p. 218).

On September 15, 1987, the District Court made its opinion of April 13, 1987 final and appealable (Joint Appendix, pp. 228-229; This Brief, pp. 58a-59a). Petitioner then appealed to the United States Court of Appeals for the Sixth Circuit. On December 12, 1988, a panel of that Court affirmed the District Court. It held that the Merit Board's reports were entitled to preclusive effect because they indicated that the Board had ". . . explicitly ruled on all of appellant's constitutional claims," when it opined that, ". . . none of appellant's constitutional rights were violated by the investigation or administrative prosecution of this matter," and that all officers involved in the investigation of Petitioner had ". . . acted in good faith," (Opinion of the Sixth Circuit, This Brief, p. 63a).

Petitioner then sought rehearing *en banc* from the Sixth Circuit. On March 14, 1989, the court entered an Order indicating that , ". . . less than a majority of the judges [of the full Court] . . . favored the suggestion," for *en banc* rehearing and denying Petitioner's plea (This Brief, p. 65a). Petitioner is now seeking a Writ of Certiorari from this Court.

ARGUMENT

The Courts Below Failed to Meet Minimally Acceptable Standards for Federal Courts That Must Attempt to Apply State Law of Preclusion in Determining Whether or Not to Dismiss Federal Constitutional Claims Under the Rules Set Forth in the Cases of *Migra* v. *Warren City School District Board of Education*, 456 U.S. 75, 104 S. Ct. 886 (1983) and *University of Tennessee* v. *Elliott*, 106 S.Ct. 3229 (1986).

In *Migra* v. *Warren City School District Board of Education*, 456 U.S. 75, 104 S.Ct. 886 (1983), of course, this Court held that:

> . . . under 28 U.S.C. section 1738, state law governs the preclusive effects as to a federal issue that a section 1983 litigant could have raised in the earlier state court proceeding.

In *University of Tennessee* v. *Elliott*, 106 S.Ct. 3220, 3227 (1986), this Court stated that:

> . . . when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's Courts.

The Kentucky law of judgments encompasses a large and consistent body of case law. With a mimimum of effort it can easily be applied to the situation at bar. However, it is impossible to apply it to this situation so as to justify the results reached by the Courts below.

Even assuming that the Courts of Kentucky would accord the reports of the Jefferson County Police Merit Board the same status as papers produced by a judicial court, which Petitioner has always vehemently denied, they would give absolutely no significant preclusive effect to the Merit Board's reports in the case at bar. There are several reasons for this, reasons that the Petitioner iterated and reiterated to the Courts below.

One reason is that Kentucky law requires that *issues* sought to be precluded in a later action must have been, ". . . actually litigated and determined by the judgment in the prior action," *Whittenberg Engineering and Construction Company* v. *Liberty Mutual Insurance Company*, Ky., 290 S.W.2d 827, 833 (1965). This condition may *not* be said to exist, ". . . when the basis of the earlier decision is not made clear in the decision itself," *Philpot* v. *Minton*, Ky., 370 S.W.2d 402, 403 (1963), see also *Buck* v. *United States Aviation Underwriters, Inc.*, 763 F.2d 224, 226-227 (6th Cir., 1984). Certainly, when a Court judgment is rendered without the intervention of a jury, its basis is made clear and the judgment is effective *only* if it includes "specifically" or "specially" found facts, Kentucky Rule of Civil Procedure 52, Federal Rule of Civil Procedure 52.

Petitioner believes that it is about as plain as possible that a scattershot assertion that, ". . . none of Appellant's constitutional rights were violated," and that his adversaries acted in subjective good faith in committing the wrongs set forth in Petitioner's law-

suit (Joint Appendix, p. 132; This Brief, p. 20a) is *not a clear indication* that the specific federal Constitutional claims advanced by the Petitioner in his federal court lawsuit were actually litigated and determined by the Jefferson County Police Merit Board! There is not even any indication that the Board ever considered any of Petitioner's federal, as opposed to state, claims of unconstitutional treatment.

Certainly, there is not sufficient clarity in the Merit Board's reports to hold that the parties litigated and the Board actually determined the Petitioner's claims of unconstitutional treatment. This being the case, the Kentucky law of issue preclusion did not justify the dismissal of Petitioner's lawsuit.

Furthermore, claim preclusion did not apply in the case under Kentucky law. This is because there was no identity of "cause of action" between the Merit Board proceedings and Petitioner's federal lawsuit, *Barnes* v. *McDowell,* 848 F.2d 725, 730 (6th Cir., 1988), *Blevins* v. *Johnson,* Ky., 344 S.W.2d 875, 377 (1961).

While claim preclusion and issue preclusion might logically appear to be independent defenses, there is some authority in Kentucky law for the proposition that the Courts will not even entertain the specific defense of issue preclusion (collateral estoppel) unless a litigant can first show that claim preclusion applies. In *Citizen's Telephone Co.* v. *Anderson,* Ky., 291 S.W.2d 517, 528, (1956), for example, the Court refused to give any preclusive effect to a prior judgment on the issue of equitable relief to bar a claim for damages because

of lack of identity of cause of action. Furthermore, in *BTC Leasing Company* v. *Martin,* Ky. App. 685 S.W.2d 191, 197 (1985), the Court indicated that the preclusion defense cannot prevail unless both major branches of it exist in a particular case.

Even if identity of issue or cause of action were present in the case at bar, which they clearly were not, the Kentucky Courts would give no preclusive effect to the Merit Board's reports for the simple reason that it would be unfair and unjust to do so in the circumstances of this case. In *BTC Leasing Inc., supra,* the Court restated the ancient principle of Kentucky law that preclusion is a judicially created doctrine, ". . . that is to be applied in particular situations as fairness and justice require and . . . not so rigidly as to defeat the ends of justice." Petitioner can see no fairness or justice in according any preclusive effect whatsoever to the actions of a board that was composed entirely of members who were either appointed by or directly subordinate to the Respondents in the instant lawsuit. Petitioner can see no fairness or justice in according any preclusive effect whatsoever to the actions of a board whose attorney also represented the Respondents in the instant lawsuit and participated intimately in the Board's proceedings involving Petitioner (Joint Appendix, p. 183; This Brief, pp. 45a-46a). Petitioner can see no fairness or justice in according any preclusive effect whatsoever to the actions of a board whose chairman has stated that the Board should always uphold the actions of the police chief in

disciplinary matters (Joint Appendix, p. 185; This Brief, p. 42a).

Of course, the Courts below really had no need even to consider the issues discussed above for the simple reason that the Kentucky Courts would not even consider according any preclusive effect to the actions of a low grade administrative agency such as the Jefferson County Police Merit Board because of its nature as a forum. The Court of Appeals itself pointed out that no preclusive effect can be given to the actions of an administrative agency under Kentucky law unless that agency had, ". . . the essential characteristics of a Court," (Opinion of the Court of Appeals, p. 3; This Brief, p. 62a). No Kentucky decision holds that county police merits board or any similar agencies have such characteristics. The General Assembly, the sole source of any authority the Merit Board possesses, has mandated that appeals from the Board to Kentucky Circuit Courts, ". . . shall be tried anew as if no action had been rendered by the Board," KRS 78.445. The Courts, in upholding such *de novo* provisions, have justified them upon the basis that, ". . . agency predilictions or prejudice," are too likely to affect agency decisions to permit normal standards of judicial review alone to apply, *Osborne* v. *Bullitt County Board of Education,* Ky. 415 S.W.2d 601, 612 (1967). Certainly the facts of the case at bar vindicate the obvious hostility of the Courts of Kentucky to any notion that administrative agencies such as the Jefferson County

Police Merit Board are to be considered as essentially courts!

Furthermore, there are no Kentucky cases that give any sort of preclusive effect whatsoever to *unreviewed* administrative agency findings in any sort of subsequent judicial action not a direct appeal from the agency action itself. Even though some of the older Kentucky cases seem to contradict this principle, they really stand for the proposition, since discredited, that administrative agencies may not set aside previously entered orders or re-determine previously found facts. This principle was considered necessary to add an element of judicial-like stability to the proceedings of what have always been very politically oriented bodied in Kentucky, *Happy Coal Company* v. *Hartbarger,* 251 Ky. 779, 65 S.W.2d 977, 978 (1933). It was abandoned in the case of *Bank of Shelbyville* v. *People's Bank of Bagdad,* Ky., 551 S.W.2d 234, 236 (1977), in which the Court also retreated from its previously stated approval of the application of preclusion doctrines to the actions of administrative agencies by stating that, ". . . res judicata has *some* application to administrative proceedings *under certain* circumstances," (emphasis added).

Such circumstances clearly do not include attempts by administrative agencies to determine Constitutional issues. In Kentucky, all administrative agencies exist purely, ". . . as creatures of statute . . . [that] must find within the statute warrant for the exercise of *any* authority they claim," *Department for Natural Re-*

sources v. Stearns Coal and Lumber Co., Ky., 563 S.W.2d 471, 472 (1978), citing 1 Am. Jur. 2d, Administrative Law, Section 70 (1962). There is no warrant in KRS 78.455, the statutory justification for the Merit Board's actions that are at issue in this case, for the Board to do anything other than to determine if the discipline imposed by county police chief Edgar Helm was, ". . . unjustified or unsupported by proper evidence." There is no warrant in this statute for the board to delve into Constitutional matters.

In *Greater Cincinnati Marine Service v. City of Ludlow*, Ky., 602 S.W.2d 427, 428-529 (1980), the Kentucky Supreme Court at least implicitly rejected the notion that a local board of zoning adjustment, which exists by virtue of an enabling act similar to KRS chapter 78, namely KRS 100.217-100.261 and KRS 100.347, had any authority or ability to decide Constitutional issues. It also rejected the notion that any actual purported decision on Constitutional issues that such a board might make would be entitled to any deference by the Courts, *Greater Cincinnati Marine, Id.*, and approved the practice of raising Constitutional issues in what was otherwise an appeal from an order by the board of zoning adjustment. Certainly if such issues can be raised separately under such circumstances they may be raised separately by a lawsuit in a federal district court!

In *Weaver v. Anderson County Fiscal Court*, 648 F. Supp. 1575, 1579-1980 (E.D. Ky., 1987), the Court held flatly that the actions of boards such as boards

of zoning adjustment could *not* be treated as the actions of courts under Kentucky law in light of the *Greater Cincinnati Marine* case, so that their actions could *never* be entitled to any preclusive effect whatsoever in subsequent judicial proceedings. As Petitioner argued below, police merit boards are even lower on the totem pole of Kentucky administrative agencies than boards of local zoning adjustment. This is because boards of zoning adjustment are at least not subject to any *de novo* judicial review statutes as are police merit boards, see KRS 100.217, 100.221 to 100.261, and KRS 100.347, so that the actions of merit boards should not be accorded any greater deference than those of boards of zoning adjustment.

CONCLUSION

Petitioner believes that in this case the lower federal courts have failed to meet any sort of minimally acceptable standard for applying the straightforward rules set forth in the *Migra* and *Elliott* opinions, *supra*. The District Court did not even *attempt* to apply the Kentucky law of judgments to the issue of whether or not certain papers originating from the Jefferson County Police Merit Board precluded Petitioner's claims of federal Constitutional deprivation. The Court of Appeals at least admitted that it should attempt to apply the Kentucky law of judgments to the issue at bar. However, it cited not one Kentucky opinion in support of its affirmance of the District Court. The one federal opinion that the Court of Appeals

cited, *Barnes* v. *McDowell, supra,* dealt with *judicially* reviewed findings that were quite detailed and explicit, and in the *Barnes* case the Court actually reversed a lower court ruling that the plaintiff's Constitutional claims were barred by the doctrine of issue preclusion! In this case, neither Court below, of course, reached a result that could in any manner be said to be consistent with the Kentucky law of judgments.

It appears to the Petitioner that if this Court's *Migra* and *Elliott* opinions are to be taken at all seriously, then the opinion of the Court of Appeals in the case at bar should not be permitted to stand. The opinion seems to the Petitioner to be an open invitation to the federal courts of this land to dismiss any federal Constitutional lawsuit that has been preceded by any sort of state proceedings with any sort of relationship to the Constitutional lawsuit, no matter how tenuous the relationship, so long as the Courts remember to make some sort of cavalier reference to the relevant state law of judgments. In both the result that they reached and the manner in which they reached it, the Courts below have, ". . . so far departed from the accepted and usual course of judicial proceedings," in the case of the District Court and, ". . . so far sanctioned such a departure by a lower Court," in the case of the Court of Appeals, Supreme Court Rule 17.1(1) that the Court should not hesitate to exercise its power of supervision by granting this Petition and considering this case completely on its merits.

Respectfully submitted,

PHILIP C. KIMBALL
545 South Shelby Street
Louisville, Kentucky 40202
(502) 587-7086
634-9126

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have served true copies of this Petition and attached papers upon William Warner, Esq., 621 West Main Street, Louisville, Ky. 40202, and N. Scott Lilly, Esq., 1001 Fiscal Court Bldg., Louisville, Ky. 40202, by mailing the same to them at their respective offices upon this the ____ day of June, 1989, all pursuant to Rule 28.3 of the Supreme Court of the United States.

PHILIP C. KIMBALL
545 South Shelby Street
Louisville, Ky. 40202
(502) 587-7086, 634-9126

Attorney for Petitioner

APPENDIX

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES DISTRICT COURT

Civil Action No. C-82-0565-L(B)

GALEN NELSON, - - - - - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, KY., et al., - - - *Defendants*

PLAINTIFF'S AMENDED COMPLAINT

Comes now the Plaintiff, by counsel, to file the attached as his Amended Complaint. This pleading is filed pursuant to the Court's Orded of February 5, 1986.

Respectfully Submitted,

PHILIP C. KIMBALL
Co-Counsel for Plaintiff
200 Kennedy Avenue
Louisville, Ky. 40206
(502) 895-0671
634-9126

CERTIFICATE OF SERVICE

I hereby certify that I have served true copies of this and the attached papers upon the following named individuals by delivering the same to their respective offices upon this the 12th day of March, 1986: William Warner, Esq., 621 West Main Street, Louisville, Ky. 40202, and Michael Allen, Esq., Legal Arts Bldg., Louisville, Ky. 40202.

PHILIP C. KIMBALL
Co-Counsel for Plaintiff

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-82-0565-L(B)

GALEN NELSON, - - - - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, KY., et al., - - - - *Defendants*

PLAINTIFF'S AMENDED COMPLAINT

Comes now the Plaintiff, Galen Nelson, by counsel, and for his amended complaint against the Defendants, states and represents as follows:

PARTIES TO LAWSUIT

1. The Plaintiff, Galen Nelson, is and has been at all times material to this lawsuit a citizen of the United States of America and a resident of Jefferson County, Kentucky.

2. At all times material to this lawsuit, the Defendant Jefferson County was a municipal corporation and political subdivision of the Commonwealth of Kentucky, which was governed by the Defendants Jefferson County Fiscal Courty and County Judge Mitch McConnell, and was the employer of all of the named individual Defendants in this lawsuit.

3. At all times material to this lawsuit, the Defendant Edgar Helm was Chief of the Jefferson County Police Department; the Defendant Kenneth Graham was the Associate Chief of the Jefferson County Police Department; and the Defendants Charles Topp, David Whelan, Kenneth

Lampe, and James Fuchs were officers of various ranks of the Jefferson County Police Department.

LEGAL AND JURISDICTIONAL BASIS OF LAWSUIT

4. This action arises under the Constitution of the United States of America, particularly under the provisions of the first, fourth, fifth, sixth, and fourteenth amendments thereto, and under the laws of the United States, particularly under Title 42 of the United States Code, Section 1983; as well as under the laws and constitution of the Commonwealth of Kentucky.

5. This Court has jurisdiction over this lawsuit under and by virtue of Title 28 of the United States Code, Section 1343 and/or by virtue of Title 28 of the United States Code, Section 1331, as well as by virtue of its inherent power to decide pendant state claims.

6. Each and all of its acts complained of herein committed by the Defendants other than Jefferson County, Kentucky were done under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the Commonwealth of Kentucky and the Defendant Jefferson County, Kentucky, and under the authority of their respective offices of employment with the Defendant Jefferson County Kentucky; and each said individual Defendant is liable to the Plaintiff in both his individual and official capacities for the wrongs that the Plaintiff alleges against him herein.

7. The Defendants Jefferson County, Kentucky, Jefferson County Fiscal Court, and Mitchell McConnell knew or should have known of the propensity of the other individual Defendants to violate the Constitutional rights of the Plaintiff and are further responsible for the unconstitutional acts of the other individual Defendants because the acts were official in nature and done pursuant to policies and procedures handed down by the Defendants Jefferson

County, Kentucky, Jefferson County Fiscal Court, and Mitch McConnell.

THE PLAINTIFF'S CONSTITUTIONALLY PROTECTED CONDUCT

8. During 1981, in the exercise of his rights to freedom of speech, redress of greivance, and due process of law as guaranteed to him by the first, fifth, and fourteenth amendments of the Constitution of the United States, the Plaintiff filed a lawsuit against the Defendants Jefferson County, Kentucky, Jefferson County Fiscal Court, and Mitch McConnell, styled "Applicants for Intervention's Complaint," Charles W. Baker, et. al. v. Jefferson County, Kentucky, No. C-80-0039.

9. On June 24, 1982, in the exercise of his rights to freedom of speech as guaranteed by the first and fourteenth amendments of the Constitution of the United States, the Plaintiff wrote a letter to the Defendant Edgar Helm in which he criticized the operation of the radio room of the Jefferson County Police Department.

10. On July 16, 1982, in the exercise of his rights to freedom of speech, redress of grievances, and due process of law as guaranteed to him by the first, fifth, and fourteenth amendments of the Constitution of the United States, the Plaintiff filed an appeal of a two day suspension from his employment with the Jefferson County Police Department by the Defendant Edgar Helm to the Jefferson County Police Merit Board.

11. On August 30, 1982, in the exercise of his rights to redress his greivance, his right to freedom of speech, and his right to due process of law as guaranteed to him by the first, fifth, and fourteenth amendments of the United States Constitution, the Plaintiff filed an appeal of another two day suspension from his employment with the Jefferson

County Police Department by the Defendant Edgar Helm to the Jefferson County Police Merit Board.

12. On September 2, 1982, in the exercise of his rights to freedom of speech, redress of greivances, and due process of law as guaranteed to him by the first, fifth, and fourteenth amendments of the United States Constitution, the Plaintiff filed and appeal of an indefinite suspension of his police powers as an officer of the Jefferson County Police Department by the Defendant Edgar Helm to the Jefferson County Police Merit Board.

13. On September 24, 1982, the Plaintiff in the exercise of his rights to freedom of speech, redress of greivances, and due process of law, as guaranteed to him by the first, fifth, and fourteenth amendments to the Constitution of the United States, filed the instant lawsuit in this Court.

DEFENDANTS' ACTS IN RETALIATION FOR THE PLAINTIFF'S CONSTITUTIONALLY PROTECTED CONDUCT AS DESCRIBED ABOVE

14. On or about July 8, 1982, the Defendants Helm, Graham, and Topp confiscated a pair of pants and shoes belonging to the Plaintiff without just cause and in retaliation for the Plaintiff's conduct as described in paragraphs 8 and 9, above.

15. On or about July 14, 1982, the Defendants Helm, Graham, and Topp caused a two day suspension from his employment with the Jefferson County Police Department to issue against the Plaintiff without just cause and in retaliation for the Plaintiff's conduct as described in paragraphs 8 and 9, above.

16. On or about August 26, 1982, the Defendants Helm, Graham, and Topp caused an additional two day suspension from his employment with the Jefferson County Police Department to issue against the Plaintiff without just cause

and in retaliation for the Plaintiff's conduct as described in paragraphs 8, 9, and 10, above.

17. On or about August 31, 1982, the Defendants Helm, Graham, and Topp caused the indefinite suspension of the Plaintiff's powers as a Jefferson County Police Officer and his reassignment from normal police duties with the Jefferson County Police Department without just cause and in retaliation for the Plaintiff's conduct as described in paragraphs 8, 9, 10, and 11, above.

18. On or about August 31, 1982, the Defendants Helm, Graham, and Topp caused the Plaintiff to be the subject of an indefinite and unwarranted "investigation" by the Defendants Topp, Fuchs, and Lampe in retaliation for the Plaintiff's conduct as described in paragraphs 8, 9, 10, and 11, above.

19. On or about August 31, 1982, the Defendant Helm caused the Plaintiff to undergo multiple psychiatric and psychological tests without just cause and in retaliation for the Plaintiff's conduct as described in paragraphs 8, 9, 10, and 11, above.

20. On or about September 28, 1982, the Defendants Helm, Graham, Topp, Fuchs, and Lampe caused the Plaintiff to be discharged from his position of employment with the Jefferson County Police Department without just cause and in retaliation for the Plaintiff's conduct as described in paragraphs 8, 9, 10, 11, 12, and 13, above.

OTHER VIOLATIONS OF THE PLAINTIFF'S CONSTITUTIONAL RIGHTS BY THE DEFENDANTS

21. In confiscating the Plaintiff's shoes on July 8, 1982, as noted in paragraph 14, above, the Defendants Helm, Graham, and Topp violated his Constitutional right to due process of law in the protection of his personal property, as guaranteed to him by the fifth and fourteenth amendments to the United States Constitution.

22. In forcing the Plaintiff to undergo psychiatric and psychogical evaluations, as outlined in paragraph 19, above, the Defendant Helm was engaged in an invasion of the Plaintiff's privacy as guaranteed to him by the first, fifth, and fourteenth amendments of the United States Constitution.

23. On or about August 31, 1982, the Defendants Helm, Topp, Fuchs, and Lampe commenced a criminal investigation against the Plaintiff, which investigation continued for approximately two months, and during the course of which the Defendants named in this paragraph required the Plaintiff to give statements and other evidence which could be used against him without advising him and in deprivation of his Constitutional rights to silence, dus process of law, confrontation of the witnesses against him, knowledge of the charges against him, and legal counsel, as guaranteed to him by the fifth, sixth, and fourteenth amendments to the United States Constitution.

24. From August 31, 1982, and continuing until the present, the Defendants Helm, Topp, Fuchs, and Lampe violated the Plaintiff's right to free speech, privacy, and association by harassing, coercing, threatening, and intimidating his friends and associates and ordering him to talk to one Beverly Bailey and severely restricting his friendship and acquaintship with Officer Douglas Hawkins of the Jefferson County Police Department. The rights at issue here are guaranteed to the plaintiff by the first, fifth, and fourteenth amendments of the United States Constitution.

25. On September 16, 1982, the Defendants Helm, Whalin, Lampe, Topp, and Fuchs performed an unreasonable search of the Plaintiff's vehicle and home, in violation of the Plaintiff's rights under the teenth and fourth amendments of the United States Constitution.

26. As a direct and proximate result of the Defendants' violation of his Constitutional rights, the Plaintiff has suf-

fered great mental and emotional distress, mortification of feelings, humiliation and embarassment, has lost wages of approximately $65,000, and has been forced to incur expensive attorney's fees and Court costs in order to attach to vindicate his constitutional rights.

WHEREFORE, the Plaintiff demands as follows:

1. Injunctive and other equitable relief, including but not limited to reinstatement to his position of employment with the Jefferson County Police Department, a ban on any punitive action against him because of his Constitutionally protected activity, and backpay.

2. Compensatory damages against all Defendants for the specific wrongs alleged against said Defendants jointly and severally against the responsible Defendants, the total award not to exceed the sum of $1,000,000.00.

3. Punitive damages against all Defendants for the specific wrong alleged against said Defendants jointly and severally against the responsible Defendants, the total award not to exceed the sum of $5,000,000.00.

4. A trial by jury upon all issues so triable.

5. His costs, including a reasonable fee for his attorneys as owed by law.

6. Any and all other relief to which he may appear entitled.

(s) Philip C. Kimball
Philip C. Kimball
Co-Counsel for Plaintiff
200 Kennedy Avenue
Louisville, Ky. 40206
(502) 895-0671
634-9126

Commonwealth of Kentucky

JEFFERSON COUNTY POLICE MERIT BOARD

IN RE: Appeal of Galen Nelson

ORDER

On May 7, 1984, the Board heard testimony and arguments of counsel pertaining to the Appellant's Motion to Dismiss the charges placed against him which resulted in his termination from the Jefferson County Police Department. The Appellant has asserted seven different grounds in his Motion to Dismiss dated April 20, 1984. Each basis for dismissal was separately set forth in a numerical paragraph.

As for the grounds asserted in paragraphs 1, 2, 4 and 6 of Appellant's Motion to Dismiss, the Board unanimously denies Appellant's Motion to Dismiss on those grounds. As for the grounds asserted in Paragraphs 3, 5 and 7 of Appellant's Motion to Dismiss, the Board, by vote of 4 to 1, denies Appellant's Motion to Dismiss on those grounds. The basis for the Board's ruling is set forth below.

The Board has consistently held that the sixty day limitation for a hearing contained in KRS 15.520 and KRS 78.460 is analagous to a statute of limitations which can be affirmatively waived. In the instant case, the Appellant affirmatively requested a delay in the proceedings after a hearing date was scheduled within the sixty day period and, in doing so, unquestionably waived the sixty day requirement. He cannot now come back and assert lack of jurisdiction of this Board to hear the charges after both the Board and the Department relied on the waiver by Appellant.

Appellant made several other arguments in relation to KRS 15.520 and Chapter 78 which the majority of the Board also finds are insufficient to warrant dismissal of the charges. The requirement of an affidavit to initiate charges against a police officer is only applicable when a citizen seeks to initiate an investigation of a police officer's acts or conduct. KRS 78.445(2), the statute specifically governing this Board, is quite explicit that a citizen's complaint must be taken under oath. Nowhere in Chapter 78 is the affidavit requirement placed upon Departmental investigations implemented as a result of information gained from official sources.

As for the allegation the Department violated KRS 15.520(1)(b) by threatening the Appellant with termination if he failed to obey a direct order to answer any question during the administrative interviews, the Board does not interpret the subject statute so restrictively. The Board believes the clear intent of the statute is to prohibit threats, promises or coercions of an improper or an illegal nature. It begs reason to suggest that an Officer *not* under investigation can be threatened with discipline for failing to obey a direct order as he is required to do under the SOP while an Officer under investigation is immune from the same discipline merely because he is under administrative investigation.

The Department did not violate KRS 15.520(1)(c) by allegedly interfering with Appellant's vacation and questioning him in less than the 48 hours required by the statute. The Appellant waived the 48 hour requirement after consulting with his counsel and for his own benefit. The Board finds no merit in Appellant's argument in this regard. Nor does the Board find any merit in Appellant's argument that he was entitled to all rights afforded a criminal suspect. It is quite clear from the tendered documents that the Department proceeded in an administrative manner and did

not place any criminal charges against the Appellant. The mere fact that the Department was administratively investigating acts or conduct by the Appellant which implicated violation of criminal statutes is insufficient to implicate the entire panorama of constitutional rights to be afforded a criminal suspect unless the Department demonstrated by its acts that it intended to proceed with a criminal investigation.

Appellant's allegation that the Department violated KRS 15.520(1)(f) by making public statements regarding Appellant's termination is a wholly baseless claim. The unrebutted testimony presented to this Board is that the Department honored proper open records request by the media and the only public statements made by anyone regarding this matter were those made by Appellant's prior counsel, F. R. Radolovich.

Finally, as for the Appellant's claim that Dr. Barrett was a person of a "non-governmental nature", merely because he was permanently employed by the University of Louisville and acted as an independent contractor in the instant matter, is without substance. The unrebutted testimony of Dr. Barrett that he was hired by the Jefferson County Police Department, reported to the Jefferson County Police Department or its agents, and was paid by the Jefferson County Police Department for his psychological evaluation of the Appellant, patently demonstrates his work was for a "governmental" purpose. The Board is unaware of any case law precedent which holds a person must be a permanent, full time employee of a government agency in order to be considered an agent of that entity.

For the reasons stated above and the aforestated determinations of the Board on the various grounds asserted by Appellant in his Motion to Dismiss, Appellant's Motion is hereby denied.

So ordered this 18th day of May, 1984.

(s) Herbert L. Warren
Herbert L. Warren, Chairperson
Jefferson County Merit Board

Attested to:

(s) Jeanette Priebe
Jeanette Priebe, Acting
Secretary/Examiner

Commonwealth of Kentucky

JEFFERSON COUNTY POLICE MERIT BOARD

IN RE: Appeal of Galen Nelson

DISSENT

I dissent from the Board's Order denying Appellant's Motion to Dismiss in so far as it denies Appellant's Motion pursuant to the grounds set forth in Paragraphs 3, 5 and 7 of the Motion. These particular grounds directly or indirectly related to KRS 15.520(1)(b) which states:

> No threats, promises, or coercions shal be used at any time against any police officer while he or she is a suspect in a criminal or Departmental matter. Suspension from duty with or without pay, or reassignment to other than officer's regular duties during such period shall not be deemed coercion.

To me, it is obvious that the Department's use of a document entitled "Jefferson County Police Department Administrative Proceedings Rights" clearly violates this statute because it states in Paragraph 4 that a Police Officer's discharge will be sought if he refuses to answer a question after being ordered to do so. Further, in the instant case, ordering the Appellant to be psychologically evaluated by Dr. Barrett under threat of termination also clearly violated this statute.

If the Legislature had intended to prohibit only "improper" threats, promises or coercions, as the majority suggests, it could have drafted the statute in a manner which clearly reflected that intent. Since the Legislature did not qualify the types of threats, promises or coercions prohibited by the statute, I believe that threatening an

officer with termination because he refuses to answer a question during an administrative interview or threatening to terminate him if he refuses to be psychologically evaluated by the Department's doctor clearly violates the explicit languages of the statute.

Therefore, since the Appellant was threatened with termination for various reasons on several different occasions in clear violation of KRS 15.520(1)(b), I would dismiss the charges of the Department and reinstate the Appellant.

(s) Daniel Plyler
Officer Daniel Plyler
Hearing Board Member
Date: 501884

Attested to:

(s) Jeanette Priebe
Jeanette Priebe, Acting
Secretary/Examiner

Commonwealth of Kentucky

JEFFERSON COUNTY POLICE MERIT BOARD

IN RE: Appeal of Galen R. Nelson

FINDINGS AND ORDER

After the Board had entered its original Findings and Order dated September 21, 1984, the parties filed various motions. As a result of those motions, the Board determined it was necessary to expand upon the original Findings and Order. Therefore, the Findings and Order dated September 21, 1984 are hereby withdrawn and the following shall constitute the Board's Findings and Order in this matter.

Hearing was held before the Merit Board on August 29 and 30, 1984 pursuant to KRS 78.455(1) on the appeal of Galen R. Nelson from the action of the Chief of Police terminating his employment with the Jefferson County Police Department by letter dated September 28, 1982.

A quorum of the Board was present. The appealing employee, Galen R. Nelson, was present in person and represented by counsel, Keith McCormick and Philip Kimball. Captain Charles Topp appeared on behalf of the Department and was represented by counsel, William T. Warner.

The Chief's termination letter of September 28, 1982 lists eight (8) separate grounds on which he based the termination of the Appellant. However, at the hearing on this matter, Mr. Warner advised the Board that the Department's charge contained in paragraph 7(d) of the Chief's letter was withdrawn. As for the remainder of the charges, many of which were serious in nature and were spread over an extended period of time, it should be noted that the Board received a voluminous amount of documen-

tary and testimonial evidence which was carefully reviewed and considered by the Board in its deliberations.

As to the Fisherman's Park incident and the claim for damaged uniform items (paragraphs 1 and 2 of the Chief's letter), the Board is unanimous only in that it finds that the Appellant did in fact, as charged, fail to obey a direct order to provide a properly detailed report of the incident. Two members of the Board believe the broader charges relating to this incident are proved by proper and competent evidence. The other two members of the Board, however, believe that although the Appellant's claim may have arguably involved uniform items which were unserviceable prior to Appellant's filing the claim, the Department overreached in its handling of the matter.

As to the charge involving the Appellant's threat on the Chief's life (paragraph 3 of the Chief's letter), the Board agrees only that Appellant spoke the words indicated in Sgt. Mozeleski's testimony. In fact, Appellant never denied speaking the words which the Chief charges constituted an improper threat but Appellant asserts that the circumstances attending at the time (a) rendered his words innocent or innocuous, and/or (b) that Appellant was unreasonably stressed by the investigation of the Fisherman's Park incident, an earlier two day suspension and his being physically ill. Thus, Appellant argues he was not really responsible for his actions in making the threat. Two members of the Board are convinced that Appellant's conduct, as charged, is proved beyond any possible justification or excuse, that such conduct is inappropriate for a police officer under any circumstances and such charged and proven conduct in and of itself warrants termination. Two other members of the Board, while believing the incident transpired, do not believe that dismissal is warranted given the context and circumstances which attended at the time.

By far, the most serious charge against the Appellant relates to his possession and subsequent destruction of cameras he allegedly knew to be stolen (paragraph 4 of the Chief's letter). There are also separate charges of untruthfulness related to this charge (paragraphs 7.a., b. and c. of the Chief's letter) which are, of course, dependent on the sufficiency of the primary charge.

The Chief's evidence on this charge involved an intricately documented investigation consisting of a substantial amount of circumstantial proof and the testimony of Beverly Bailey.

The Board was evenly divided on the credibility of Bailey's testimony. While not prepared to nominate Bailey for sainthood, two members of the Board believed her testimony at the hearing, despite her earlier self-serving and untruthful statement to Department investigators, for the basic and important reason that her testimony was substantially corroborated by other facets of the Department's investigation. Since these two members believe these related charges to have been proven, they also believe it is patent such conduct warrants dismissal.

The other two members of the Board, however, do not believe that Bailey is a credible witness or that her testimony was reliable. These two members believe Bailey's credibility is severely compromised by her admitted involvement in criminal conduct, her previous contrary statements and her possible bias again the Appellant. In fact, these two members do not even believe that the corroborating evidence offered by the Chief clearly establishes the connection between Appellant and the stolen property. Based on these circumstances, these two members of the Board are unwilling to base the termination of an officer and the resulting destruction of his career on what they consider to be Bailey's unreliable account and the related circumstantial evidence.

As to the charges involving Appellant's possession of a marijuana pipe found during a search of his van and Appellant's accusations against Lt. Whalen and Sgt. Fuchs (paragraphs 5 and 6 of the Chief's letter), the entire Board, while not in any respects condoning possession of drug paraphernalia, does not believe that the proof offered by the Department as to this charge, alone and without reference to the other charges, warrants serious discipline. The parties seemed to make a concerted effort regarding the conclusive identity of the pipe as being the one actually found by Lt. Whalen during his search. Whether the profferred pipe was indeed the one found by Lt. Whalen does not in any way diminish Lt. Whalen's testimony that he found *a* pipe which he *believed* to be drug paraphernalia. The Board is unanimous in its belief that Appellant's allegation charging Lt. Whalen with "planting" the pipe is unfounded.

As to the charge involving Appellant's participation in mercenary type activities, and soliciting other members of the Department for such activities (paragraph 8.a. of the Chief's letter), the Board is again divided, but the members do not share the unanimous conclusion that the Department's regulations concerning off-duty employment are somewhat ambiguous and apparently inconsistently enforced.

The Appellant's defense to this charge is that, first, he was working for another officer, Joe Anneken, who himself had approval to conduct off-duty security business, and second, that his "solicitation" of other officers for "mercenary" activities in foreign countries was mere bluff or bragging on Appellant's part.

It is the belief of two members of the Board that Appellant's admission in this regard, without reference to any specific Department regulation, constitutes conduct which no police department should find acceptable whatever

the intent of the officer engaging in such conduct. It is the further belief of these two members that Jefferson County Police officers are disciplined professionals and that the mere "bragging" about such predilections or intentions by a *single* officer is unacceptable as tending to compromise the entire Department.

The other two members of the Board, however, tend to accept Appellant's rationalization of his conduct in this regard and believe that the Chief's sensitivity to such conduct is exaggerated.

Therefore, taking the charges and the evidence as a whole, two members of the Board believe that the action of the Chief in dismissing Appellant was supported and justified by proper evidence. The two other members of the Board, while not condoning Appellant's conduct in numerous instances, believe that only a suspension is warranted and would not uphold the Chief's decision to terminate the Appellant.

Because the Board was unable to reach a majority decision that the action of the Chief terminating the Appellant was unjustified and unsupported by proper evidence and, as a result, having reached a tie vote ow two to two on the Chief's action terminating the Appellant, the Chief's action is affirmed pursuant to KRS 78.455(1) which requires a *majority* of the Board to find the Chief's action unjustified or unsupported by proper evidence before such action may be set aside and revoked.

Aside from the merits of the Chief's charges against the Appellant relating to his conduct, or the sufficiency of Appellant's defenses to the substance of these charges, this case has been remarkable for the constant allegations by the Appellant that his civil rights have been violated by the Chief and other officers throughout the Department investigation. The Board would note that it has previously ruled it has authority to hear and act on claims of unconsti-

tutional treatment: see *In Re: Appeal of Officer Charles W. Baker,* Opinion dated May 28, 1982. Even though the Board may only dismiss the charges as a remedy for such deprivation this does not affect the Board's power and responsibility to make specific findings regarding such claims.

In the instant matter claims of unconstitutional treatment of the Appellant first appeared in this forum in the Appellant's appeal letter dated September 28, 1982 (DX-4) and persisted throughout these proceedings. Appellant's Motion to Dismiss filed April 20, 1984 included such claims and on May 7, 1984, the Board held a lengthy evidentiary hearing on all aspects of Appellant's Motion to Dismiss, including claims of deprivation of Appellant's constitutional rights.

By Opinion and Order dated May 18, 1984, with one member partially dissenting on technical statutory grounds, the Board rejected Appellant's claims of unconstitutional treatment or deprivation by Chief Helm or by the Department in the investigation and administrative prosecution of the case.

After due deliberation and careful consideration of the testimony and evidence on the merits of the case at the August 29 and 30, 1984 hearing in this case, the Board remains of the firm opinion that none of Appellant's constitutional rights were violated by the investigation or administrative prosecution of this matter. The Board specifically finds, and is unanimous on this point, that the officers who participated in this case, as is reflected in all of the proceedings before the Board, acted in good faith and in a manner which they believed to be lawful, proper and necessary in view of all circumstances under which they were required to act.

Entered this 20th day of March, 1985.

(s) Paul G. Tobin
Paul G. Tobin, Chairperson

Attested To:

(s) Norma Fletcher
Norma Fletcher
Acting Secretary/Examiner

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 82-0565-L(B)

GALEN NELSON, - - - - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, KY., et al., - - - *Defendants*

MEMORANDUM AND ORDER

This civil rights action, Title 42 U.S.C. Section 1983, is before the Court on the motion of defendants to dismiss.

Defendants advance two arguments in support of their motion.

RES JUDICATA

The Jefferson County Police Merit Board upheld the discharge of plaintiff by defendant Helm. Pursuant to KRS 78.455(2)(a), plaintiff appealed that decision to the Jefferson Circuit Court on April 18, 1985. Apparently that appeal has been prosecuted with something less than vigor and it is now under submission on defendant's motion to dismiss for failure to prosecute.

It is now settled in this circuit that an unreviewed decision of a state administrative agency is not entitled to preclusive effect under Title 28 U.S.C. Section 1738. *Elliott* v. *University of Tennessee*, 766 F.2d 982 (1985).

Defendants' motion to dismiss as *res judicata* will be denied.

QUALIFIED IMMUNITY

At first blush it would appear that defendants are cloaked with qualified immunity. It is argued, however,

by plaintiff that the search of his van was unreasonable and that a marijuana "pipe" was planted in the van by the officers executing the search warrant. He further argues that his discharge was motivated by defendant's displeasure with his abortive attempt to intervene in a Title VII action pending before then Chief Judge Allen and in which a consent decree was being drafted.

". . . [Q]ualified immunity . . . provides ample protection to all but . . . those who knowingly violate the law." *Malley* v. *Briggs*, — U.S. —, 106 S. Ct. —, 54 U.S. L.W. 4243, 4245 (3/5/86).

Assuming plaintiff can sustain his burden of persuading the jury that the marijuana pipe was planted in his van or that his discharge was motivated by his exercise of his Frst Amendment rights, or both of thes allegations, the shield of qualified immunity would be shattered and the motion to dismiss will be denied.

It Is So Ordered this 4th day of April, 1986.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-82-0565-L(B)

GALEN NELSON, - - - - - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, KY., et al., - - - *Defendants*

PLAINTIFF'S RESPONSE TO DEFENDANTS' RENEWED AND SUPPLEMENTAL MOTION TO DISMISS

Comes now the Plaintiff, by counsel, to respond to the Defendants' renewed and supplemental motion to dismiss. The Plaintiff's Response consists of the attached Memorandum of Authorities with attached exhibits and affidavits.

Respectfully Submitted,

(s) Philip C. Kimball
Philip C. Kimball
Co-Counsel for Plaintiff
200 Kennedy Avenue
Louisville, Ky. 40206
(502) 895-0671
634-9126

Cecil Davenport
Co-Counsel for Plaintiff
835 West Jefferson Street
Louisville, Ky. 40202
(502) 585-3225

CERTIFICATE OF SERVICE

I hereby certify that I have served true copies of this and the attached papers upon N. Scott Lilly, 1001 Fiscal Court Bldg., and William T. Warner, 621 West Main Street, Louisville, Ky. 40202, by delivering the same to their respective offices upon this the 30th day of October, 1986.

(s) Philip C. Kimball
Philip C. Kimball

Introduction

The case is presently before the Court upon the Defendant's renewed motion to dismiss the Plaintiff's claims against them, all of which were brought pursuant to 42 United States Code section 1983 and involve alleged violations of Plaintiff's rights under the Constitution of the United States, upon the purported basis that certain administrative proceedings in which Plaintiff has engaged resulted in actions by the administrative agency involved that operate as a bar to this action by application of the doctrine of res judicata.

The agency involved, of course, is the Jefferson County Police Merit Board, all of whose relevant findings and orders have been presented to this Court as attachments to the Defendants' motion to dismiss or has attachments to previous motions. In addition to these documents, the Defendants have produced certain documents from Jefferson Circuit Court that purport to be a judgment on the merits of an appeal that Plaintiff took from the Jefferson County Police Merit Board. Unfortunately for the Defendants, as we shall see, these documents have been vacated and nullified by the issuing Court itself, which has issued further an Order that effectively renders the actions of the Merit Board judicially unreviewed.

Applicable Principles of Federal Law

The first principle of federal law in cases such as the one at bar is that state law determines the preclusive or res judicata effect of either unreviewed administrative findings or such reviewed findings or any judgment or order of any court or agency, *Migra* v. *Warren City School District Board of Education*, 104 S. Ct. 892, 79 L.Ed.2d 56 (1984), *University of Tennessee* v. *Elliott*, 106 S.Ct. 3320, 92 L.Ed.2d 635 (1986).

More specifically, in *Migra*, 104 S.Ct. at 896, the high Court held". . . under 28 U.S.C. Section 1738, state law governs the preclusive effects as to a federal issue that a section 1983 litigant could have raised in the earlier state court proceedings," In *Elliott*, 106 S.Ct. at 3227, the Court reversed the United States Court of Appeals for the Sixth Circuit, which had held that unreviewed state administrative findings and orders can never preclude a subsequent action brought pursuant 42 U.S.C. section 1983, and opined as follows:

> . . . when a state agency acting in a judicial capacity resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . federal courts must give the agency's fact-finding the same preclusive effect to which it would be entitled in the State's Courts.

Applicable Principles of State Law Regarding the Judgment of Jefferson Circuit Court

In their motion now before the Court, the Defendants invoke the *Migra* opinion, *supra*, for the proposition that a judgment of the Jefferson Circuit Court attached to their motion as Exhibit E is entitled to be accorded complete res judicata effect so as to bar all of the Plaintiff's claims against them. The purported judgment was issued in an action in which the Plaintiff appealed to the Jefferson Circuit Court from an adverse ruling of the Jefferson County Police Merit Board, which had upheld his dismissal by the County Police Department and its then Chief, Edgar Helm, a Defendant in this action.

Attached hereto are the same judgment tendered by the Defendants, which shows that on July 14, 1986, it was vacated, as well as an Order of the Jefferson Circuit Court also entered on July 14, 1986, which recites that the Plain-

tiff's appeal to it was, ". . . dismissed without prejudice to the substantial rights of any of the parties." The vacated Order is attached hereto as Exhibit A, the Order now in effect in the case is attached hereto as Exhibit B.

Under Kentucky law, of course, a dismissal "without prejudice" is not an adjudication upon the merits of litigation and can never have any sort of res judicata effect upon other litigation, *Hays* v. *Sturgill*, 302 Ky. 31, 193 S.W.2d 648, 649 (1946), see also *Hertz Commercial Leasing Corp.* v. *Joseph*, 641 S.W. 2d 743 (1982), *Polk* v. *Wimsatt*, Ky. App., 689 S.W. 2d 363 (1985), and *Eline* v. *Commercial Credit Corp.*, 307 Ky. 77, 209 S.W. 2d 846 (1948), as well as CR 41.01.

Contrary to the Defendants' assertion, therefore, for purposes of the application or non-application of the doctrine of res judicata to the findings and orders of the Jefferson County Police Merit Board in this case, those findings and orders are judicially unreviewed under Kentucky law.

Applicable Principles of State Law Regarding the Findings and Order of the Jefferson County Police Merit Board

Res judicata, of course, is an "affirmative defense" under both Kentucky and federal law, CR 8.03, FRCP 8(c). Under Kentucky law, the burden of proving it falls upon the defendants, CR 43.01, Bertlesman and Phillips, *Kentucky Practice*, 1984 edition, Vol. VII, P. 89. Since the application or nonapplication of the doctrine is a matter of law, the Defendants have the additional burden of satisfying the Court that the law is upon their side of the issue.

This they have utterly and miserably failed to do. In fact, they have not cited to this Court one case in which the doctrine of res judicata by that name or any other was even mentioned or applied. This circumstance alone justifies, nay demands, the denial of their motion for summary judgment.

Plaintiff requests that this Court not consider any of the analysis that follows as in any manner a waiver of this paramount ground for rejecting Defendants' motion for summary judgment.

* * * * * * *

Even if this Court decides to look beyond the insufficiency of the Defendants' motion to sustain their plea for judgment, it still ought to deny the motion. This is because an analysis of Kentucky law clearly indicates that it does not accord unreviewed administrative findings of the sore offered by the Defendants any preclusive effect whatsoever in other proceedings.

There are a few older cases that state that the doctrine of res judicata is, ". . . as applicable to the quasi-judicial acts of [administrative agencies] as it is to judgments of courts," *Happy Coal* v. *Hartbarger*, 251 Ky. 779, 65 S.W.2d 977, 978 (1933). However, in these cases, which also include *Cardinal Bus Lines* v. *Consolidated Coach Corp.*, 254 Ky. 586, 72 S.W.2d 7, 9 (1934) and *Muncy* v. *Hughes*, 265 Ky. 588, 97 S.W.2d 547, 549 (1936), the doctrine was applied merely in order to prevent the respective administrative agencies (the Workmen's Compensation Board, the Commissioner of Motor Transportation, and the Hazard City Council, respectively) from setting aside previously entered orders. The clearly stated rationale for these decisions was to add an element of judicial-like stability to the proceedings of what were at that time obviously very political oriented bodies, *Happy Coal Co.*, *supra*, at 978, *Cardinal Bus Lines*, *supra*, at 10.

In a somewhat later case, *Williamson* v. *Public Service Commission*, 295 Ky. 376, 174 S.W.2d 526, 528-529 (1943), the old Court of Appeals did not hesitate to apply the doctrine of res judicata to an Order of the state Public Service Commission where the matter had been reviewed once

by the Franklin Circuit Court and was then *again* brought before that Court:

> . . . by the same plaintiff against the same defendant, seeking identical relief as that sought in the action in which the Franklin Circuit Court has previously adjudged.

Once again, and with even less excuse than in the cases previously cited, the Court paid lip service to the purported principle that the doctrine of res judicata is as applicable to the actions of administrative agencies as to the actions of Courts, *Id.*

So far as the Plaintiff could find, no Kentucky opinion since the year 1943 has applied the principles of res judicata or collateral estoppel to the actions of administrative bodies. Considering the considerable growth in the number and powers of such agencies since World War II in this commonwealth and throughout the United States, this fact alone in and of itself militates against the Defendants' motion in the case at bar.

There is one fairly recent case from the Kentucky Supreme Court in which the issue at bar was indirectly addressed. In *Bank of Shelbyville* v. *People's Bank of Bagdad*, Ky., 551 S.W.2d 234, 236 (1977), the Court refused to apply the doctrine of res judicata to the order of an administrative agency so as to prohibit the agency's changing its own stance upon the issue of a branch bank permit. The Court merely noted as a general principle, ". . . that this Court has held that res judicata has some application to administrative proceedings under certain circumstances," *Id.* This is a far cry from the broad statement of principle quoted earlier from the *Happy Coal Co.* case, *supra.* It indicates both an understandable judicial disillusionment with the ability of administrative agencies to

do substantial justice and a recognition that, as we have seen, the actual judicial application of the doctrine of res judicata to the doings of administrative agencies in Kentucky opinions has always been very restricted.

Before proceeding further, the Plaintiff must note that the Defendants have made no attempt whatsoever to show that the administrative papers that they have presented in this case come under the "certain circumstances" to which the Kentucky Courts have indicated the doctrine of res judicata might have, "some application," *Id.*, and so have utterly failed to carry their burden of summarily proving their affirmative defense of res judicata.

The judicial disillusionment of the Courts of Kentucky with the ability of administrative agencies to do substantial justice is readily apparent not only in the *Bank of Shelbyville* case, but in the very cases cited by the Defendants in the motion at bar, which deal specifically not with the doctrine of res judicata at all, but with the meaning of *de novo* review provisions such as apply to appeals to circuit court from the actions of the Jefferson County Police Merit Board. An analysis of these and related cases indicate that the courts of this Commonwealth would likely never apply the doctrine of res judicata to the actions of agencies which operate, like the Merit Board, pursuant to enabling legislation that includes a right of de novo review to a circuit court.

In considering these cases, it is important to remember that the interpretation of the enabling acts under which a particular administrative agency exists is the key to determining the res judicata effect, if any, of that agency's findings or action, *2 Am. Jur. 2d*, Administrative Law, section 498, P. 308. This is particularly true in Kentucky, where administrative agencies are strictly creatures of statute with no authority whatsoever to act outside of the limits prescribed by their respective enabling acts, *Depart-*

ment for Natural Resources and Environmental Protection v. *Stearns Coal and Lumber Company*, Ky., 563 S.W.2d 471, 474-475 (1978).

County police force merit boards are authorized by KRS 78.410, and their powers and duties are spelled out in succeeding subsections. These Boards exist as a surrogate for the county judge executive, who otherwise has the sole executive and administrative authority for the recruiting, maintaining, disciplining, and operating the county police force, KRS 70.540, KRS 78.440. The membership of these boards consists of four persons appointed by the county judge, as well as two police officers elected by their colleagues to hear disciplinary matters only. In cases of a tie vote, the county judge is empowered to break the tie. Otherwise, he is an ex officio member of the Board. KRS 78.410.

These Boards have the statutory authority to "review" disciplinary decisions by the county police chief, but the statute provides no standards for such review and allows decisions to be made based upon the "opinions" of the members of the board as to whether or not," . . . the action of the chief is unjustified or unsupported by proper evidence," KRS 78.455. The courts of Kentucky have accepted the propriety of such vague guidelines in police discharge cases generally, opining in *Harrell* v. *City of Middlesboro*, Ky., 287 S. W. 2d 614, 615 (1956) that judicial deference was due to a city council's," . . . findings as to the mores of the community," in such a case.

The obvious reason for the acquiescence of the Courts in this state of affairs is that the Kentucky General Assembly had provided discharged local police officers, and most other discharged local government employees, with a right of de novo review from the decisions of the legislative or administrative bodies or officers charged in the first instance with the duty to "review" the propriety of the dis-

charge. KRS 78.455 provides for example, that appeals from decisions of county police merit boards," . . . shall be tried anew [in circuit court] as if no action had been rendered by the board." While the courts have never been enthusiastic about such provisions, they have almost universally honored them to at least some extent when the object of their protection has been public employees, as we shall see.

First, however, it should be noted that the de novo provision of KRS 78.455 upon its face indicates a serious mistrust upon the part of the General Assembly of the ability of the merit boards to do substantial justice in adjudicatory matters. It is reasonable to conclude that the legislature's direction that the actions of the boards should be but nullities upon appeal indicates that they should also be nullities for similar purposes, such as the application of the doctrine of res judicata. For this reason alone, the Defendants' motion now before this Court ought to be overruled and denied.

The Defendants have, however, cited certain cases that discuss ne novo provisions similar to KRS 78.455 for the proposition that:

> The Jefferson County, Kentucky, Police Merit Board is deemed a "quasi judicial" hearing body under Kentucky state law with broad powers of subpoena and with a positive duty to provide exhaustive due process to litigants before the Merit Board, and to consider the full range of issues presented (Defendants' Motion, P. 8)

Before discussing the cases cited by the Defendants for this proposition it should once again be noted that the proposition itself, which is as near as the Defendants come for making any kind of coherent argument in support of their motion, does not even include within it the conclusion that

the Defendants are asking this Court to reach, which is that the papers that they have presented from the Jefferson County Police Merit Board have complete res judicata effect so as to bar the Plaintiff's claims in the instant lawsuit. It may indeed be necessary that the Merit Board be under a duty to attempt to provide due process to those who appear before it in order to assert that its actions are res judicata in other proceedings, but it is hardly sufficient for that purpose. Since the Defendants have advanced no other arguments in support of their motion, it obviously fails as a matter of law.

Ironically, the cases cited by the Defendants for the above-cited proposition, namely *American Beauty Homes Corporation* v. *Louisville & Jefferson County Planning and Zoning Commission*, Ky., 379 S. W. 2d 459 (1964), *Brady* v. *Pettit, Mayor*, Ky., 586 S. W. 2d 19 (1979), and *Taxpayer's Action Group of Madison County* v. *Madison County Board of Elections*, Ky. App., 652 S. W. 2d 666 (1983), indicate a judicial hostility toward the ability of administrative agencies from whose actons de novo review to a circuit court is available by statute that completely negatives any possibility that the courts might accord such actions any res judicata effect whatsoever.

In the oldest of the cited opinions, *American Beauty Homes, supra*, the old Court of Appeals was faced an appeal from a circuit court judgment of an appeal to the circuit court de novo from a determination of a local zoning commission. The high court held flatly that the statute that permitted de novo review by circuit court of an administrative action violated the Kentucky Constitution's separation of powers provision because it sought to impose a legislative or executive function upon the judiciary. The Court also rejected the notion that characterizing the action of any administrative body as "judicial" or quasi-judicial" as opposed to executive, legislative, or administrative, would

save the de novo review provision from Constitutional attack with this scathing attack upon the ability of administrative bodies to perform judicial functions:

> It is very doubtful that characterizing the functions of an administrative agency as quasi judicial serves any purpose but to confuse. Though such an agency may adjudicate, it does not exercise judicial power and the term [quasi judicial], instead of correlating the agency with the judiciary, may mean exactly the opposite, *Id.*, at 458, note 10.

Obviously, the *American Beauty Homes* case completely contradicts the Defendants' motion, as under *Elliott, supra*, unreviewed state administrative orders and findings can be considered res judicata only if the administrative agency involved was acting in a "judicial capacity."

The other cases cited by the Defendants offer little more assistance for their position than the *American Beauty Homes* case. The *Taxpayers Action Group* case, *supra*, simply has nothing to do with the issues of de novo hearings or res judicata. *Brady* v. *Pettit, supra*, at 31, summarizes developments in Kentucky law since *American Beauty Homes, supra*, whereby the courts have relaxed the Constitutional prohibition against de novo judicial review in situations involving the discharge of public employees. However, it does not inform us of the reasons for this retreat from the principles enunciated in the *American Beauty Homes* case.

For these reasons we must look to the case of *Osborne* v. *Bullitt County Board of Education*, Ky., 415 S.W.2d 607 (1967). In that case, the Bullitt Circuit Court, relying on *American Beautly Homes, supra*, had refused to hear de novo an appeal by a school teacher who had been discharged after a hearing before the Bullitt County Board of Edu-

cation. The Old Court of Appeals reversed, citing Professor Jaffee's observation that

> . . . there are certain decisions such as revocation of or failure to renew a license which are of crucial importance to the licensee, the decisions of which is liable to be influenced by agency predeliction or prejudice. A legislature may feel that for such cases there should be available the special safeguards of the judicial process. Considerations such as these should cause the Courts to hesitate before holding that the statute imposes upon them a forbidden judicial function, *Osborne*, *supra*, at 612.

The retreat from *American Beauty Homes* is obviously purely a pragramatic one, designed to safeguard the rights of public employees from the whim and caprice of the administrative bodies charged with this task in the first instance. The basic principal that administrative bodies can never function truly in a "judicial capacity" remains as viable today as it was when so emphatically asserts in the *American Beauty Homes* case. In short, the judiciary continues to mistrust the ability of administrative agencies to do justice at least as much as the General Assembly did by inserting de novo review provisions in their enabling acts. Because of these facts and the complete absence of any authority to rebut their negative implications for the Defendants' motion, it is obvious that the motion ought to be denied and overruled.

* * * * * * *

Even assuming, arguendo, that the "Findings and Order" of the Merit Board could be said to have some preclusive effect as a general matter upon subsequent litigation, i.e. the same preclusive effect as the judgment of a circuit court, the doctrine of res judicata would not bar the

Plaintiff's claims in the instant lawsuit because of this fact. There are several reasons for this conclusion, as the following analysis of the Kentucky law of judgments will readily illustrate.

First of all, the Merit Board's "Findings and Order" fail to meet at least two of the "technical elements" that must be present before the doctrine of res judicata may be invoked as to any judgment or order. One of these elements is identity of cause of action. This does not merely mean, ". . . identity of the subject matter," of the former and later action because, as the Court stated in *Blevins* v. *Johnson*, Ky., 344 S.W.2d 375, 377 (1961):

> Undoubtedly, the subject matter involved in the two actions must be the same [in order for res judicata to apply] for otherwise there could not be identity of the cause of action, but the same transaction or state of factors may give rise to distinct or successive causes of action, and a judgment on one will not necessarily bar a judgment on the other.

While it hardly seems proper to dignify the Plaintiff's proceedings in the Jefferson County Police Merit Board with the ancient legal designation of a "cause of action," if they were such they were limited in remedy to Plaintiff's reinstatement to the police force. This, of course, is a form of equitable relief. The present suit, on the other hand, is one for damages as well as for reinstatement. The courts of Kentucky have characterized situations in which a claimant was entitled to assert claims for both equitable and "legal" relief as the invasion of more than one primary right, *Citizen's Telephone Company* v. *Anderson*, Ky., 291 S.W.2d 517, 528 (1956). In the *Citizen's Telephone* case, a judgment upon a previous suit for restoration of the plaintiff's telephone service was held not to bar her later suit for damages for the wrongful removal of her tele-

phone, *Id.* Except for the more mundane subject matter of the *Citizen's Telephone* case than that of the case at bar, the two are practically identical. Kentucky's highest court refused to apply the doctrine of res judicata in that case even though the defendant pleaded and proved a valid court judgment between the parties in a case that was identical to the later one in every way except for the relief sought being legal as opposed to equitable. It would undoubtedly do so in this case as well, assuming it had a valid judgment to work with, which the Defendants have been unable to produce. Without such a judgment, there is simply no way that any Kentucky appellate court would accord any preclusive effect to any of the papers that the Defendants have produced in this case.

Another element that must exist before the Courts will apply the doctrine of res judicata or its corollary doctrine of collateral estoppel is that the issues sought to be precluded in the later action must have been, ". . . actually litigated and determined by the judgment in the prior action, *Whittenberg Engineering and Construction Co.* v. *Liberty Mutual Ins. Co.*, Ky., 290 S.W.2d 877, 833 (1965). Proof of this element is a heavy burden for a party asserting that the doctrine of res judicata applies in a particular instance because, "When the basis of the earlier decision is not made clear [in the decision itself] it cannot operate as res judicata," in the later proceedings, *Philpot* v. *Minton*, Ky., 370 S.W.2d 402, 403 (1963). As even the Defendants have admitted, none of the particular allegations of constitutional deprivation that have been advanced in this lawsuit are, ". . . directly mentioned in any of the Merit Board findings," save that involving the planting of a marihauna pipe in the Plaintiff's van during the course of a search of the van by various individual Defendants. Of course, the Defendants assert that the Board, ". . . held explicitly that none of Nelson's constitutional rights were

violated by any of the Defendants or Jefferson County," (Defendants' Motion, P. 9).

Indeed, the Merit Board did so, in just such vague terms as those employed by the Defendants in their motion. An examination of the Board "Findings and Order" of March 20, 1985 and its "opinion and Order" dated May 18, 1984, which is attached to one of the Defendants' earlier pleadings in this case, indicates that they never mention the United States Constitution. The later document did contain some discussion of various Kentucky statutory provisions designed to insure the fair treatment of police officers in disciplinary matters. However, neither the Merit Board nor the Defendants in their motion now before this Court have made any attempt whatsoever to equate these statutory provisions with any provision of the United States Constitution. At the very least, it is unclear that the Merit Board ever considered any of the Constitutional rights at issue in the case at bar, save the one relating to the marihauna pipe. At most, the issue is clearly that they did not consider these Constitutional rights. Either way, no preclusive effects may attach to their actions in this regard.

The lack of any of the elements of res judicata is completely fatal to its application in any manner, *BTC Leasing Inc.* v. *Martin*, Ky. App., 685 S.W.2d 191, 197 (1985). Therefore, upon either the ground that there is no identity of cause of action between the proceedings at bar and those held before the Merit Board or upon the ground that the Merit Board did not clearly articulate that it was basing its denial of the Plaintiff's appeal to it upon the same bases as those advanced by the Plaintiff in this lawsuit, the Defendants' plea of res judicata must fail.

One final reason militates strongly against the application of the doctrine of res judicata in this case as a bar to the Plaintiff's claims based upon his proceedings before

the Jefferson County Merit Board. This is that the doctrine exists only as a, ". . . judicially created doctrine . . . of reason, justice, fairness, expediency, practical necessity . . . [and] public tranquility," the application of which must be shown by its proponent to be proper in any particular case, *Floyd County Board of Education* v. *Layne*, Ky., 474 S.W.2d 397, 400 (1972).

In addition to the reasons set forth above, there exist upon the record of this case the following facts that indicate that justice, fairness, expediency and even practical necessity are all against the application of res judicata in the case at bar:

1. The Board's "decision" was made upon a tie vote. Two members believed that the chief's evidence against the Plaintiff was not proper and that his discharge of Plaintiff was unjustified. Two members believed the contrary. The Board determined that the effect of this tie was to uphold the action of the chief, who is a primary Defendant in the case at bar.

2. Two of the Board members who voted to sustain the chief's discipline of the Plaintiff, Herbert Warren and Paul Tobin, were appointed to the Board by A. Mitchell McConnell, a Defendant in this lawsuit. The other two were police officers who were elected by their colleagues and must work on a day-to-day basis with the command structure of the Jefferson County Police Department, which includes most of the numerous individual Defendants in this case. In fact, one of these Defendants, David Whalin, is now assistant chief of the department that employs these police officer members. Under these circumstances, it is even amazing that these gentlemen voted to rescind the chief's dismissal of the Plaintiff.

3. The fact, as attested in the affidavit attached hereto as Exhibit C, that the Board's attorney, who participated in its secret deliberations upon the merits of Plaintiff's appeal to the Board and undoubtedly in its drafting of findings and orders relating to the case, is one of the same gentlemen who have been representing at least some of the Defendants in this lawsuit since the beginning. This attorney is N. Scott Lilly. It is axiomatic in American and Kentucky law that substantial justice depends at least upon the absence of any appearance of impropriety. The appearance of impropriety in the above-related circumstances is overpowering.

4. The fact, as attested in the affidavit attached hereto as Exhibit D, that Herbert Warren, who acted as Chairman of the Merit Board during most of the proceedings involving the Plaintiff before the Board, has stated that he believes that the Board's function is to uphold the chief and maintain discipline in the county police department regardless of the evidence or facts in a particular disciplinary case.

Because res judicata is a judicial creature, ". . . that is to be applied in particular situations as fairness and justice require, and . . . not so rigidly as to defeat the ends of justice," *BTC Leasing, supra*, at 198, this Court obviously has the power to deny the Defendant's motion even if all of the technical requirements of res judicata are present in the instant case and even if the "Findings and Order" of the Merit Board are entitled to complete preclusive effect under Kentucky law, because to sustain the motion would be obviously unjust. Since none of the technical requirements of res judicata are present in the instant lawsuit and since the "Findings and Order" of the Merit Board are probably entitled to no preclusive effect what-

soever under Kentucky, the Court's decision upon this issue is simple and the Defendants' motion obviously ought to be overruled.

(s) Philip C. Kimball
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Co-Counsel for Plaintiff
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634-9126

JEFFERSON CIRCUIT COURT

DIVISION FIFTEEN

No. 85CI-02748

GALEN NELSON, - - - - - - - - - *Plaintiff*

v.

JEFFERSON COUNTY POLICE
MERIT BOARD, et al. - - - - - - *Defendants*

ORDER

Cross-motions for dismissal pursuant to CR 41.02 having been filed by the parties, and the Court being sufficiently advised, it is hereby

ORDERED that the Plaintiff's Complaint and appeal pursuant to KRS 78.455(2) are hereby dismissed.

This is a final and appealable order and there is no just cause for delay.

(s) B. K. Shobe
Jefferson Circuit Judge
Entered 6/30/86

JEFFERSON CIRCUIT COURT

DIVISION FIFTEEN

No. 85CI-02748

GALEN NELSON, - - - - - - - - - *Plaintiff*

v.

JEFFERSON COUNTY POLICE MERIT BOARD - - *Defendant*

AND

RUSSELL MCDANIEL - - - - - - - *Defendant*

ORDER

The matter is before the Court upon the Plaintiff's motion to dismiss this action without prejudice. The Court having considered the motion and any response thereto, is of the opinion that it ought to be granted.

Now therefore it is hereby ORDERED that this action be and is DISMISSED without prejudice to the substantial rights of any of the parties.

(s) Benjamin Shobe
Benjamin Shobe, Judge

Date Entered July 14, 1986

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-82-0560-L(B)

GALEN NELSON, - - - - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, KY., et al., - - - *Defendants*

AFFIDAVIT OF GALEN NELSON, PLAINTIFF

Comes now the affiant, Galen Nelson, and after first being duly sworn, deposes and says as follows:

1. That I am the Plaintiff in the within action.

2. That on August 29, and 30, 1984, the Jefferson County Police Merit Board held a hearing upon my appeal to it of two suspensions and a dismissal that had been meted out to me by Jefferson County Police Chief Edgar Helm. I was present during the entire hearing. The two civilian members of the Board were Herbert Warren and Paul Tobin. The attorney for the Board was N. Scott Lilly. The attorney for the Jefferson County Police Department was William Warner. The departmental representative was Captain Charles Topp, a Defendant in this action. When the Board retired into executive session after hearing the evidence presented at the hearing, Mr. Lilly went with it and stayed with it, except for two occasions, each of which lasted approximately three or four minutes, when he left the Board's deliberations for private conversations with Mr. Warner and Captain Topp. No persons other than Mr. Lilly were allowed to be with the Board during its deliberations, which lasted at least three hours.

Further, the affiant sayeth naught.

(s) Galen Nelson
Galen Nelson, Affiant

COMMONWEALTH OF KENTUCKY
COUNTY OF JEFFERSON

Subscribed and sworn to before me by Galen Nelson upon this the 30th day of October, 1986.

My commission expires: August 20, 1988

(s) Donna K. Reese
Notary Public

HAND WRITTEN STATEMENT BY DOUGLAS W. HAWKINS

I, Douglas W. Hawkins, do hereby affirm and swear that:

While I was a member of the Jefferson County Police Merit Board I heard one of the civilian members who I believe was the Chairman, Mr. Herb Warren, state during deliberations on a prior case the following: He stated that it was up to us to uphold the Chief's decision to hire someone if the Chief was acting in good faith, even if it was later found that the information he used to make that decision was erroneous or false. I, and the other police member, Danny Plyler, disagreed but the Chief's decision in that case was upheld over our objections.

(s) Douglas W. Hawkins
10-30-86
12:47 P.M.

(s) Chady S. Eversole 10-30-86
State of Kentucky
My Commission expires:
Sept. 8, 1990

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 82-0565-L(B)

GALEN NELSON - - - - - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, KENTUCKY, et al. - - *Defendants*

MEMORANDUM AND ORDER

This matter is before the Court on the motion of defendants to dismiss the action against them in their official capacities as *res judicata*.[1]

Since the Court's memorandum and order of December 12, 1986, did not address the *res judicata* issue in any detail, we reexamine the history of this litigation.

Plaintiff is a former Jefferson County Police Officer. He originally commenced this action alleging harassment by some defendants who are or were command officers in the Jefferson County Police Department. He invoked the Court's jurisdiction under Title 42 U.S.C. § 1983. Plaintiff was thereafter discharged by defendant Helm, then the Police Chief. Plaintiff amended his complaint to assert a claim for retaliatory discharge.

Pursuant to KRS 78.455(1) plaintiff appealed his discharge to the Jefferson County Police Merit Board which,

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[1]The order of the Court denying defendants' claim of qualified immunity and the action against them in their personal capacities is before the Court of Appeals for the Sixth Circuit on interlocutory appeal. *Mitchell* v. *Forsyth*, ___ U.S. ___, 105 S. Ct. 2806 (1985).

by a tie vote, upheld the Chief's decision. Plaintiff then appealed to the Jefferson Circuit Court which, under Subsection (2)(a) of the cited statute, is to conduct a *de novo* trial.

On June 30, 1986, Jefferson Circuit Judge Shobe ordered plaintiff's complaint and appeal dismissed for failure to prosecute. Ky. R. Civ. P. 41.02. Judge Shobe appended a finality endorsement on the order.

On July 14, 1986, Judge Shobe wrote in long hand, "Order vacated" on the June 30 order and by separate order of the same date, he dismissed the action "without prejudice to the substantial rights of any of the parties."

Plaintiff argues the dismissal without prejudice is not an adjudication on the merits, citing *Migra* v. *Warren City School Dis. Bd. of Educ.*, 465 U.S. 75, 104 S.Ct. 982 (1984).

Migra reaffirms the proposition "that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Id.*, 465 U.S. at 81, 104 S.Ct. at 896.

That doctrine causes the Court no concern, nor is our concern whether a dismissal without prejudice[2] is or is not an adjudication on the merits. For our present purposes, we will assume that it is not an adjudication on the merits.

We perceive two hurdles which plaintiff cannot negotiate.

First, plaintiff cannot seriously suggest that the Kentucky courts would not give preclusive effect to Judge Shobe's July 14 order should plaintiff attempt to reinstate his appeal of his discharge and the Merit Board's decision to uphold his discharge. While the dismissal may not

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[2]We conclude that the language "to the substantial rights of any of the parties" is surplusage.

amount to an adjudication on the merits, the opportunity for an adjudication was available and plaintiff is now barred from obtaining an adjudication on the merits. In other words, the challenge to the due process afforded by the Merit Board was extinguished by the dismissal of July 14, 1986, as were any other claims addressing the adequacy or impartiality of the Merit Board's review.

Second, the Court finds the *University of Tennessee* v. *Elliott*, __ U.S. __, 106 S.Ct. 3220 (1986), directs this Court to give preclusive effect to the Merit Board's decision.

Plaintiff's reliance on *Elliott* misapplies the holding in that case. It is true that the *Elliott* Court affirmed the Court of Appeals for the Sixth Circuit in its holding that unreviewed state administrative fact findings are not to be given preclusive effect in Title VII claims. This action is not a Title VII claim; it is a § 1983 claim. The *Elliott* Court addressed the doctrine of *res judicata* as it applies to the preclusive effect to be given the factfindings of state administrative tribunals:

> "We have previously recognized that it is sound policy to apply principles of issue preclusion to the factfinding of administrative bodies acting in a judicial capacity. In a unanimous decision in *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), we held that the factfinding of the Advisory Board of Contract Appeals was binding in a subsequent action in the Court of Claims involving a contract dispute between the same parties. We explained:
>
> > 'Although the decision here rests upon the agreement of the parties as modified by the Wunderlich Act, we note that the result we reach is harmonious with general principles of collateral estoppel. Occasionally courts have used language to the effect that *res*

judicata principles do not apply to administrative proceedings, but such language is certainly too broad. . . . When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.' *Id.*, at 421-422, 86 S.Ct., at 1559-1560 (1966) (footnotes omitted).

* * * * *

Having federal courts give preclusive effect to the factfinding of state administrative tribunals also serves the value of federalism. Significantly, all of the opinions in *Thomas* v. *Washington Gas Light Co.*, 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980), express the view that the Full Faith and Credit Clause compels the States to give preclusive effect to the factfindings of an administrative tribunal in a sister State. *Id.*, at 281, 100 S.Ct., at 2660 (opinion of STEVENS, J.); 287-289, 100 S.Ct., at 2663-2664(WHITE, J., concurring in judgment); 291-292, 100 S.Ct., at 2666 (REHNQUIST, J., dissenting). The Full Faith and Credit Clause is of course not binding on federal courts, but we can certainly look to the policies underlying the Clause in fashioning federal common-law rules of preclusion. 'Perhaps the major purpose of the Full Faith and Credit Clause is to act as a nationally unifying force,' *id.*, at 289, 100 S.Ct., at 2664 (WHITE, J., concurring in judgment), and this purpose is served by giving preclusive effect to state administrative factfinding rather than leaving the courts of a second forum, state or federal, free to reach conflicting results. Accordingly, we hold that when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact

> properly before it which the parties have had an adequate opportunity to litigate,' *Utah Construction & Mining Co., supra*, 384 U.S., at 422, 86 S.Ct., at 1560, federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." (Footnotes omitted.) — U.S. at —, 106 S.Ct. 3226.

See also *Fowler* v. *City of Louisville*, 625 F. Supp. 181 (W.D. Ky. 1985), *aff'd*, 803 F.2d 719 (6th Cir. 1986), *cert. denied*, — U.S. —,107 S.Ct. 1375 (1987).

The Merit Board has found as a fact that defendant Helm was justified in discharging plaintiff and our reading of *Elliott* convinces us that in the interest of federalism we must give preclusive effect to that finding.

The Court is of the opinion that defendants' motion for summary judgment must be granted. Our inquiry does not end here, however.

As we noted in footnote 1, an interlocutory appeal of the order of the Court denying defendants' claim of qualified immunity is pending before the Court of Appeals for the Sixth Circuit. This Court has a niggling doubt as to its jurisdiction to dismiss this action while that appeal is pending.

Counsel will be directed to address this doubt by memorandum within 30 days of this memorandum.

It Is So Ordered this 13th day of April, 1987.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 86-5381

GALEN NELSON, - - - - *Plaintiff-Appellee,*

v.

EDGAR G. HELM, KENNETH GRAHAM, CHARLES TOPP, DAVID WHALIN, KENNETH LAMPE, and JAMES FUCHS, - - *Defendants-Appellants.*

On Appeal from the United States District Court for the Western District of Kentucky

---

Decided and Filed _____

BEFORE: LIVELY, Chief Judge; ENGEL and KRUPANSKY, Circuit Judges.

PER CURIAM. Defendants-appellants (appellants) appealed from the district court's order denying their motion for summary judgment based upon qualified immunity in this action commenced pursuant to 42 U.S.C. § 1983. Appellants, all present or former members of the Jefferson County, Kentucky (Louisville) Police Department (JCPD) are former Chief Edgar G. Helm (Helm), Associate Chief Kenneth Graham (Graham), Captain Charles Topp (Topp), Lieutenant David Whalin (Whalin), Sergeant Kenneth Lampe (Lampe), and Sergeant James Fuchs (Fuchs).[1]

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[1]Jefferson County, the JCPD, and the county executive were also defendants in this action but are not appellants herein.

Plaintiff-appellee is Galen Nelson (Nelson), a former JCPD officer.

In his amended complaint filed in the district court, Nelson alleged that he was harassed, twice suspended without pay, and eventually discharged from the JCPD in violation of his rights under the First and Fourteenth Amendments to the United States Constitution.[2] Specifically, Nelson charged that the individual defendants' conduct was in retaliation for his attempted intervention in *Baker* v. *Jefferson County, Kentucky*, No. C-80-0039-L(A) (W.D. Ky.),[3] for his criticism of the operation of the JCPD radio room, for his pursuit of state administrative remedies challenging the suspensions without pay, and for his commencement of the present lawsuit. Nelson also alleged that the appellants, and Whalin in particular, "planted" a "marijuana pipe" in Nelson's van in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution. Whalin found the "marijuana pipe" during a search of the van conducted pursuant to a previously obtained search warrant.

On April 2, 1986, after extensive discovery, the appellants moved the district court for summary judgment based upon the doctrine of qualified immunity as enunciated in

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[2]Nelson commenced this action prior to his discharge. He amended his complaint after his termination to allege that his discharge was also in violation of his First and Fourteenth Amendment rights.

[3]*Baker* was a civil rights action commenced by a class of black officers and prospective officers to redress alleged racial discrimination in the hiring and promotional practices of the JCPD. The case was settled by consent decree and Nelson sought to intervene on behalf of a class of white police officers for the purpose of challenging the proposed consent decree. The district court in that case overruled Nelson's motion to intervene. *Baker* v. *Jefferson County, Kentucky*, No. C-80-0039-L(A) (W.D. Ky. April 8, 1961).

Harlow v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). On April 4, 1986, the district court denied the motion, and appellants thereafter commenced this timely appeal. *See Mitchell* v. *Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (denial of motion to dismiss/for summary judgment based upon qualified immunity is an immediately appealable order).

In *Kennedy* v. *City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1334, 94 L.Ed.2d 185 (1987), this court determined that a defendant state or local official in a § 1983 action was entitled to qualified immunity in two situations:

1) if the plaintiff has failed to "plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known." and 2) "even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a general [sic, "genuine"] issue as to whether the defendant in fact committed those acts." 797 F. 2d 299 (quoting *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2816). In the case at bar, appellants did not assert that Nelson's allegations failed to state claims for violations of clearly established statutory or constitutional rights. Rather they assert that Nelson failed to uncover any evidence during discovery to substantiate those claims.

Upon review of the record, and the briefs and oral arguments of the parties herein, this court concludes that genuine issues of material fact exist as to whether the appellants committed the acts as alleged by Nelson. Judge Ballantine, therefore, properly denied appellants' motion for summary judgment based upon qualified immunity. Accordingly, the district court's order of April 4, 1986 denying that motion

is AFFIRMED, and this case is hereby REMANDED to the district court for further proceedings.

ISSUED AS MANDATE: 8/6/87

COST: none

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 86-5381

GALEN NELSON, - - - - *Plaintiff-Appellee,*

v.

JEFFERSON COUNTY, KENTUCKY, - - - *Defendant,*
E. G. HELM, JR., Et Al., - - *Defendants-Appellants*

ORDER—Filed July 28, 1987

BEFORE: LIVELY, Chief Judge, ENGEL and KRUPANSKY, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of the Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered By Order of The Court

(s) John P. Hehman
John P. Hehman, Clerk

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 82-0565-L-(B)

GALEN NELSON - - - - - - - - *Plaintiff*

v.

JEFFERSON COUNTY, KENTUCKY, et al. - - *Defendants*

MEMORANDUM AND ORDER

In a previous memorandum filed April 13, 1987, this Court ruled that the defendants were entitled to summary judgment on plaintiff's § 1983 claim for retaliatory discharge. However, the Court declined to enter an order to that effect until the parties had briefed this issue of whether the Court had jurisdiction to dismiss the action while an interlocutory appeal of the Court's order denying defendant's claim of qualified immunity was pending before the Court of Appeals for the Sixth Circuit. Subsequent to the parties briefing the issue but prior to this Court ruling on it, the Sixth Court affirmed this Court on the immunity issue. Consequently, the jurisdictional issue is now moot.

Also pending before the Court is plaintiff's motion to set aside the Court's granting defendants' motion for summary judgment under Fed.R.Civ.P. 59 and 60.

This motion is not timely because the Court's ruling is not yet final. However, the Court has reviewed the merits of the motion and does not find them persuasive.

The defendant has pending before the Court a motion to enter an order granting summary judgment pursuant to

this Court's April 13, 1987, memorandum and order. The Court will grant this motion and defendants' motion for summary judgment for the reasons stated in this Court's previous memorandum.

There is no just reason for delay, and this is a final and appealable order.

This 14th day of September, 1987.

(s) Thomas A. Ballantine, Jr.
Thomas A. Ballantine, Jr.
United States District Judge

Copies to counsel

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GALEN NELSON, - - - - - *Plaintiff-Appellant,*

v.

JEFFERSON COUNTY, KENTUCKY, et al., - - - - - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed December 12, 1988

Before: ENGEL, Chief Judge; BOGGS, Circuit Judge; and McRAE,* Senior District Judge.

McRAE, Senior District Judge. Appellant, Galen Nelson, brought this action under 42 U.S.C. § 1983 against the Jefferson County, Kentucky, Police Department ("County") and its officials, alleging that the County violated appellant's constitutional rights during a departmental investigation which ultimately led to his discharge. Nelson exercised his right to a review within administrative proceedings by appealing his discharge to the Jefferson County Police Merit Board ("Merit Board"), which upheld it as being proper. The court below granted a summary judgmem for the defendants because the law of Kentucky

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*The Honorable Robert M. McRae, Jr., Senior Judge of the United States District Court for the Western District of Tennessee, sitting by designation.

would give preclusive effect to the findings and holding of the Merit Board; therefore *University of Tenn.* v. *Elliott*, ___ U.S. ___, 106 S.Ct. 3220 (1986) directs that the federal courts also give preclusive effect to the Merit Board's decision. The court now affirms.

Prior to his discharge in 1982, appellant worked as a County police officer. The discharge was preceded by a departmental investigation in which appellant was found to have engaged in improper conduct. It was during the course of his investigation that appellant filed this Section 1983 case alleging his constitutional rights were violated. Thus, appellant amended his complaint to include his discharge as an additional violation.

Notwithstanding his lawsuit in federal court, Nelson sought a review of his discharge by the Merit Board under the statutory procedure set out in KRS 78.455(1). A full evidentiary hearing was conducted by the Merit Board, and at its conclusion, the discharge was upheld. Appellant took a statutory appeal to the Jefferson County Circuit Court; however, after over a year of inactivity, the Circuit Court entered an order of dismissal. Later upon the application of the appellant, the Circuit Court amended its order of dismissal to include the language "without prejudice to the substantial rights of any of the parties."

In *University of Tenn.* v. *Elliott, supra,* the Supreme Court held that when a state agency is acting in a judicial capacity, even unreviewed state administrative determinations may preclude a trial on the same issues in federal court if the determination would be entitled to preclusive effect in the appropriate state court. Thus, the application of *Elliott* is a three-step process: first, was the agency acting in a judicial capacity; second, would the decision have preclusive effect under Kentucky law; and third, does the federal action seek to litigate issues already determined by the state agency.

An administrative board acts in a judicial capacity when it hears evidence, gives the parties an opportunity to brief and argue their versions of the facts, and the parties are given an opportunity to seek court review of any adverse findings. *Detrex Chem. Industries* v. *Emp. Ins. of Wausau,* 681 F. Supp. 438, 454 (N.D. Ohio 1987). The Merit Board conducted a full evidentiary hearing, and the parties were given a fair opportunity to seek a court review. Thus, the Merit Board was acting in a judicial capacity.

This court must next look to the law of Kentucky and determine whether the courts of that state would give preclusive effect to the factual findings of its administrative agencies. In general, Kentucky courts apply the doctrine of issue preclusion as to matters which were necessarily involved and determined in a former action. *Barnes* v. *McDowell,* 848 F. 2d 725, 730 (6th Cir. 1988).

Kentucky courts subscribe closely to the philosophy of the Restatement 2d of Judgments § 83 comment b, where it said:

> Where an administrative forum has the essential characteristics of a court, therefore its determinations should be afforded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court. *Barnes* v. *McDowell,* 647 F. Supp. 1307, 1311 (E.D. Ky.) (reversed by same Court in 661 F. Supp. 498 (1987) on other grounds).

Appellant asserts that his successful effort to amend the order of the Kentucky Circuit Court dismissing his appeal of the Merit Board decision with the "without prejudice" language, negates, for preclusive effect purposes, the normal legal effect of the Merit Board decision. We do not agree. We read the "without prejudice" language as indi-

cating that the Kentucky courts would not accord the dismissal absolute preclusive effect to prevent the appellant from obtaining some further state judicial review, if any might then be available. This is particularly persuasive where the order came after a full year of inactivity and pro ided that the dismissal was without prejudice to the rights of "any of the parties." The circuit court returned the appellant to the same position he would have enjoyed if he had never exercised his right to appeal; however, under Kentucky law, this does not affect the preclusive effect of the Merit Board decision until a Kentucky court disturbs it in a timely manner under Kentucky law.

The final step in the *Elliott* analysis is a determination of whether the issues litigated by the Merit Board are the same issues sought to be litigated in the federal action. Since *Elliott* dealt with issue preclusion, any issues not necessarily involved in and determined in the Merit Board hearing, will not be precluded in federal court. *Barnes* v. *McDowell, supra,* 848 F.2d at 730.

The Merit Board has the authority to hear and act on claims of unconstitutional treatment. The Board explicitly ruled on all of appellant's constitutional claims:

> The Board remains of the firm opinion that none of appellant's constitutional rights were violated by the investigation or administrative prosecution of this matter. The Board specifically find and is unanimous on this point, that the officers who participated in this case . . . acted in good faith and in a manner which they believed to be lawful, proper and necessary in view of all circumstances which they were required to act. Merit Board Rept. pp. 6-7.

Appellant seeks to relitigate in federal court issues that have already been decided by the Merit Board. Kentucky

law afforded appellant the right to judicial review of the Merit Board's decision while acting in a judicial capacity. *Elliott* precludes him from pursuing relief in federal court. Therefore, the District Court is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 87-6070

GALEN NELSON, - - - - *Plaintiff-Appellant,*

v.

JEFFERSON COUNTY, KENTUCKY, et al., - - - - - *Defendants-Appellees.*

ORDER—Filed March 14, 1989

BEFORE: ENGEL, Chief Judge; BOGGS, Circuit Judges; and McRAE*, Senior U.S. District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

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*Hon. Robert M. McRae, Jr. sitting by designation from the Western District of Tennessee.

FILED
JUL 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2040

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

GALEN NELSON - - - - - - - - Petitioner

versus

JEFFERSON COUNTY, KENTUCKY, ADDISON MITCHELL McCONNELL, EDGAR G. HELM, JR., KENNETH GRAHAM, CHARLES TOPP, DAVID WHALIN, KENNETH LAMPE and JAMES FUCHS - - - - - - Respondents

On Writ of Certiorari to
The United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Has the Petitioner advanced any special or important reason warranting review of this case?

The Respondents respectfully answer and argue "No".

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Authorities iii

Statement of the Case 1-11

Argument: Why The Petition Should be Denied . 11-16

Conclusion 16-17

Appendix 1a-9a

APPENDIX

Page

Letter dated September 28, 1982 from F. R. Radolovich to Jefferson County [Kentucky] Police Merit Board re: administrative appeal of termination of Galen Nelson 1a-2a

Order filed March 14, 1989 in the United States Court of Appeals For the Sixth Circuit overruling Petition for Rehearing, with dissent of Wellford, J. 3a-7a

Order filed August 18, 1987 by the United States Court of Appeals for the Sixth Circuit, No. 86-6268, *Young v. McDaniel, et al.* 8a-9a

TABLE OF AUTHORITIES

Page

Cases:

Alexander Hamilton Life Insurance Company of American v. Lewis, Ky., 550 S.W.2d 558 (1977) 15

Allen v. McCurry, 449 U.S. 90 (1980) 15

Brady v. Pettit, Mayor, Ky., 586 S.W.2d 29 (1979) 7

Crouch v. Jefferson County, Kentucky Police Merit Board, Supreme Court of Kentucky, No. 86-SC-521-DG ___ S.W.2d ___ (9/8/88, as modified 6/8/89)..... 7

Doran v. Salem Inn, Inc., 422 U.S. 922 (1978)..... 11

Duvall v. Helm, Ky. App., 623 S.W.2d 234 (1981) 7

Greater Cincinnati Marine Service, Inc. v. City of Ludlow, Ky., 602 S.W.2d 427 (1980)..... 14

Haner v. United States, 440 U.S. 1308 (1979) 11

Happy Coal Co. v. Hartbarger, Ky., 65 S.W.2d 977 (1933)..... 14

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 7

Lexington Herald-Leader Co. v. Revenue Cabinet, Ky. App., 86-CA-2196 (1-29-88) 13

Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) 8, 15

Mitchell v. Forsyth, 472 U.S. 511 (1985) 7

Nelson v. Jefferson County, [6th Cir. 1989], 863 F.2d 18..... 15

TABLE OF AUTHORITIES – Continued

Page

Palmer v. Hoffman, 318 U.S. 109, 118 (1943) *reh. den.* 318 U.S. 800 (1943) 12

Steele v. General Motors, Inc., 329 U.S. 433, 438-439 *reh. den.* 329 U.S. 834 (1947) 12

United States v. Johnston, 268 U.S. 220 (1925) 12

University of Tennessee v. Elliott, 478 U.S. 788 (1986) 15

Weaver v. Anderson County Fiscal Court, [D.C. Ky., 1986], 684 F.Supp 1575; reversed 838 F.2d 1216 [6th Cir. 1988] 14

In re Woods, 143 U.S. 202 (1892) 12

Young v. McDaniel, No. 86-6268 [6th Cir. 8-18-87], [Appendix p. 8a] 14

Statutes:

Title 28, United States Code, Section 1254(1) 11

Section 1257 10

Title 42 United States Code, Section 1983 .....5, 7

Court Rules:

Rules of the Supreme Court of the United States, Rule 17.1 .....11, 16

Federal Rules of Civil Procedure, Rule 41(a)(2) 8

Rule 77(d) 9

TABLE OF AUTHORITIES – Continued

Page

Kentucky Rules of Civil Procedure,
Rule 41.01(2) 8
Rule 76.28(4)(c) 14
Rule 77.04(a) 9

STATEMENT OF THE CASE

This case was initially instituted in the United States District Court for the Western District of Kentucky under 42 U.S.C. Section 1983 by the Petitioner, Galen Nelson, a former Jefferson County, Kentucky police officer, alleging unconstitutional treatment in connection with a Departmental disciplinary investigation. Petitioner had received two short suspensions and was subsequently discharged for further misconduct after suit was filed. He then amended his Complaint to allege Fifth Amendment deprivations in connection with the dismissal, as well as asserting various pendent Kentucky state law claims.

Petitioner seeks reinstatement, back pay, and damages from the municipal Respondent, Jefferson County, Kentucky, and also damages from various individual Respondents who were elected and appointed officials affiliated at the time with Jefferson County, Kentucky and its Police Department.[1]

---

[1] Respondent Addison Mitchell ["Mitch"] McConnell was then the elected Jefferson County Judge Executive, the County's chief executive officer, and is now a United States Senator. Respondents' Edgar G. Helm, Jr. and Kenneth Graham, both now retired, were respectively the Police Department's Chief and Associate Chief. Respondents Topp, Lampe, and Fuchs are all presently commanding officers with the Department, and were at the time members of the Department's Professional Standards Unit, charged with the responsibility of investigating complaints and charges of misconduct against Department officers. During part of the relevant time period, Respondent Topp was also Petitioner's District Commander. Respondent Whalin, now a top Department Commander was, at the time, a lieutenant assigned to the Department's Criminal Investigation Division.

The events which led ultimately to Petitioner's dismissal from the Department unfolded as follows:

By Memorandum dated June 24, 1982 to Respondent Helm, who was at the time Chief of the Jefferson County Police Department [the "Department"] Petitioner requested replacement of two uniform items - a pair of shoes and pants - which he claimed had been damaged in the line of duty.

Respondent Helm routinely approved this request, but noted the last sentence in Petitioner's memorandum to the effect that " . . . [the loss of the uniform items] can be attributed to a Radio Room fowl-up (sic)". The Chief referred the matter to the Department's Administrative Services Division for a report as to any dereliction on the part of Department Radio Room personnel.

During the course of this inquiry - which was initiated by Petitioner's statement - serious questions arose as to whether Petitioner's uniform items were in fact damaged as he had claimed.

Petitioner was then given a direct order to submit a detailed written statement as to the specifics of how his uniform came to be damaged. Petitioner refused in writing to do so, a direct violation of Department regulations, for which he was suspended by Respondent Helm for two days on July 14, 1982.

Further Departmental inquiry continued as to the underlying validity of Petitioner's claim. At the conclusion of this investigation, it was determined that the uniform items for which Petitioner claimed reimbursement (a) were unserviceable *prior to* the claimed date of

damage, and (b) were *not* damaged in the manner asserted in Petitioner's written claim.

Two other significant and persistent aspects of the overall case emerged at this point.

The first was Petitioner's sarcastic, provocative attitude toward the Department and its supervisors;[2] the second was the strident, undifferentiated claims by Petitioner and his counsel that, in every respect and detail, Petitioner's constitutional rights were being violated by the Department's inquiries.

By letter dated August 26, 1982, Respondent Helm imposed an additional two-day suspension on Petitioner for attempting to effect replacement, at Department expense, of already unserviceable uniform items.

The second suspension letter was handed to Petitioner at his regular shift roll call August 26, 1982, and triggered an outburst by Petitioner which included an unambiguous threat on Respondent Helm's life.

This latter incident was witnessed by Petitioner's immediate supervisor who reported the matter in writing to Petitioner's District Commander, the Respondent Charles Topp. That report included other concerns the supervisor had about a serious pattern of aberrant behavior on Petitioner's part, which had developed over a significant period of time.

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[2] In an official Departmental interview August 9, 1982, Petitioner bragged that the uniform items for which he claimed reimbursement were unserviceable prior to the filing of his claim.

Respondent Topp immediately communicated the report to the Respondent Helm. Based on the report, as well as Petitioner's unusual, even bizarre conduct in connection with the damaged uniform claim, Chief Helm suspended Petitioner with pay, directed him to report for a psychological evaluation, and commenced a further investigation into the conduct related in the supervisor's written report.

The subsequent investigation confirmed Petitioner's erratic performance and his aggressively hostile attitudes toward fellow officers and selected members of the public.

The investigation also turned up evidence that Petitioner had held himself out to a number of officers as having connections with various foreign interests who had asked Petitioner to organize and provide men for some type of paramilitary operations or services in areas such as the Middle East. One officer who Petitioner "recruited" even went so far as to secure a passport and plan his resignation from the Department.

During the disciplinary investigation, Department investigators learned that another unrelated investigation into a break-in at a local department store during which a number of cameras were stolen, had linked Petitioner to a woman who was suspected of knowingly receiving the stolen cameras.

Further investigation into this matter conclusively established that Petitioner not only had possession of cameras stolen in that robbery, he had assisted the suspect in destroying them to avoid detection.

Based on this evidence, search warrants were obtained by Department investigators to search Petitioner's residence and personal vehicle for evidence of the stolen cameras. None was found, but officers did discover illicit drug paraphernalia in Petitioner's vehicle.

Based on all this conduct, and pursuant to explicit statutory authority under Kentucky state law, Respondent Helm dismissed Petitioner from the Department by letter dated September 28, 1982. Petitioner then took an appeal from Respondent Helm's action to the Jefferson County, Kentucky Police Merit Board [the "Merit Board"].[3]

Petitioner's formal letter appealing his dismissal asserted, *inter alia* the explicit factual allegation that Respondent Helm's dismissal of Petitioner was " . . . a retaliatory act for Petitioner's having filed suit in federal court on September 24, 1982; . . . "[4]

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[3] Under the Kentucky state law, The Merit Board administers the classified merit service from which Petitioner was dismissed. The Board also serves as the statutory reviewing authority over disciplinary appeals. The Merit Board was initially a party to the § 1983 Complaint filed in the U. S. District Court but was subsequently dismissed by agreement.

[4] Petitioner's appeal letter, dated September 23, 1982 is reprinted in the Appendix to this Brief at p.1a. The reference in the letter to "Rule 10.1(2) of the Jefferson County, Kentucky Police Merit Board" refers to the Board Rule governing disciplinary appeals. Board Hearing Rule 3.1(2), in effect at the time, required an appellant officer to file a " . . . statement of the grounds [for the appeal] . . . " with the notice of appeal, or by separate pleading or notice within five days after the filing of the initial notice. Counsel's letter also serves as compliance with this latter Rule.

The appeal to the Merit Board was stayed for over a year at Petitioner's counsel's request, and was finally brought on for a series of hearings beginning in March 1984 on various constitutional challenges Petitioner raised as to the proceedings and the underlying investigation.[5]

A full evidentiary hearing on the merits of the specific charges against the Petitioner was held before the Merit Board August 29 and 30, 1984 with four of six members present. Following this hearing, the Merit Board sustained the Respondent Helm's action dismissing Petitioner by a vote of 2-2. The Board disagreed only on the degree of punishment, whether Petitioner should be fired or given a long suspension.[6]

On April 18, 1985, Petitioner filed a statutory appeal from the Merit Board ruling with the Jefferson County, Kentucky Circuit Court.[7] No further action was taken in this case for nearly a year.

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[5] The various Findings and Orders of the Merit Board in connection with the administrative appeal are reprinted in the Appendix to the Petition, pp. 9a-21a.

[6] The governing state statute requires a majority vote to *overturn* the Chief's disciplinary action. Tie votes thus result in any given action being sustained. The Merit Board Members who heard the case were essentially agreed as to Nelson's culpability on all but one of the stated charges, disagreeing only as to the degree of punishment appropriate in the case; see Merit Board Findings and Order entered March 20, 1985; Appendix to the Petition, pp 15a-21a.

[7] The Circuit Court of each Kentucky County is the first level Court of general jurisdiction under Kentucky's unified

(Continued on following page)

In the pending U. S. District Court § 1983 case, early in 1986, Petitioner filed a motion for leave to amend his complaint. The motion was sustained February 5, 1986.

Among other matters Petitioner's amended complaint clearly and unambiguously, for the first time, asserted claims against the Respondent public officials in their respective *individual* as opposed to *official* capacities.

The Respondents moved for summary judgment asserting, in part, immunity of the Respondents in their individual capacities pursuant to *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). On April 4, 1986, the District Court denied the Motion[8] and the Respondent public officials took an immediate interlocutory appeal to the United States Court of Appeals for the Sixth Circuit under the authority of *Mitchell v. Forsyth*, 472 U.S. 511 (1985).[9]

(Continued from previous page)

state court system. The Circuit Court is also designated by Kentucky state law as the Court to which appeals of Merit Board orders may be taken by any aggrieved party, *Duvall v. Helm*, Ky. App., 623 S.W.2d 234 (1981). Review is limited to familiar and virtually universal "arbitrariness" standards; see *Brady v. Pettit, Mayor*, Ky., 586 S.W.2d 29 (1979) and *Crouch v. Jefferson County, Kentucky Police Merit Board*, Supreme Court of Kentucky, No. 86-SC-521-DG ___ S.W.2d ___ (9/8/88, as modified 6/8/89)

[8] See Memorandum and Order of the District Court entered April 4, 1986, reprinted at the Appendix to the Petition, pp 22a-23a.

[9] The Court of Appeals affirmed the District Court on this appeal in an unpublished Opinion, and a subsequent Order denying a Petition for rehearing, effective July 28, 1986, reprinted in the Appendix to the Petition pp 53a-57a; see also *post* p. 10 this Brief.

At or about this time, after a year of inactivity in the parallel Jefferson Circuit Court case involving Petitioner's appeal from the Merit Board, the Respondent Helm filed a motion to compel Petitioner to go forward with the case or suffer dismissal. In the face of this Motion, Petitioner filed a cross-motion for voluntary dismissal pursuant to Rule 41.01, Kentucky Rules of Civil Procedure, specifically asking for a "without prejudice" dismissal. The Respondent Helm objected to this type of dismissal, and on July 1, 1986, the Circuit Court entered an Order dismissing the action.[10]

The Respondents then renewed their motion to dismiss Petitioner's complaint in the District Court asserting, *inter alia*, that the "with prejudice" character of the July 1, 1986 Order of dismissal in the Circuit Court precluded further litigation in the Federal forum in accordance with the settled precedent of *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984).

Petitioner's Response to Respondent's renewed motion surfaced for the first time another "Order" entered in the Jefferson Circuit Court case on July 14, 1986, providing that the case was now dismissed "without prejudice".[11] In his response to the Respondents'

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[10] The July 1, 1986 Jefferson Circuit Court Order was silent as to whether the dismissal was with or without prejudice and thus, under the operation of CR 41.01(2) - the exact counterpart of FRCivP 41(a)(2) - the dismissal was deemed to be "with prejudice".

[11] Both the original July 1 and the "revised" July 14 Circuit Court Orders are reprinted in the Appendix to the Petition at pp 43a-44a. Respondents' counsel neither received notice of the

(Continued on following page)

renewed motion in the District Court, Petitioner now argued that *this* type of Order had no preclusive effect on Petitioner's case pending in the District Court.[12]

This unusual and controversial development notwithstanding, the District Court nevertheless entered a Memorandum and Order on April 13, 1987 which held that the Federal case was indeed subject to dismissal on preclusion grounds. That Order reserved final dismissal in the District Court, however, by reason of the interlocutory appeal pending at the time in the U. S. Sixth Circuit Court of Appeals.[13]

(Continued from previous page)

filing or pendency before the Court of the July 14 Order, nor its entry by the Court. Because so much time had elapsed, counsel had virtually no remedy in the state court by reason of Kentucky Civil Rule 77.04(a) which like FRCivP 77(d), provides that lack of notice of entry does not affect the validity of a judgment. Respondent's counsel did, however, extensively document these circumstances in their Reply Memorandum filed in the District Court together with their authenticated conclusion that they had been purposefully "blindsided" by the Petitioner's *ex parte* tactics.

[12] Petitioner has reprinted, in full, his response to Respondents' renewed motion in the Appendix to the Petition at pp 24a-42a.

[13] The Memorandum and Order entered April 13, 1987 in the District Court, provisionally granting Respondents' motion and dismissing Petitioner's complaint *in toto* is reprinted in the Appendix to the Petition at pp 48a-52a.

On July 28, 1987, the Court of Appeals affirmed the District Court on the Respondents' interlocutory appeal.[14]

Following the remand from the Court of Appeals and upon full reconsideration, on September 14, 1987, the District Court entered its final Order, restating its earlier April 13, 1987 Order granting the Respondents' motion and dismissing the Petitioner's amended complaint.[15]

The Petitioner then appealed the District Court dismissal back to the U. S. Court of Appeals for the Sixth Circuit which affirmed the District Court in a published opinion issued December 12, 1988.[16] Petitioner then filed his Petition for a Writ of Certiorari with this Court where it was docketed June 12, 1989.[17]

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[14] See p. 7, *ante*, this Brief. The unpublished opinion of the Court of Appeals is reprinted in the Appendix to the Petition at pp 53a-57a.

[15] The District Court's September 14, 1987 Memorandum and Order is reprinted in the Appendix to the Petition at pp 58a-59a.

[16] Reprinted in the Appendix to the Petitioner at pp 60a-64a. Petitioner also reprints the Court of Appeals Order filed March 14, 1989 denying his petition for rehearing en banc [p. 65a]. For some reason, Petitioner failed to include the unpublished dissent of Judge Harry Wellford, who was not a member of the original panel, but who would have granted the petition for rehearing. The Court of Appeals Order filed March 14, 1989, including Judge Wellford's dissent, is reprinted at p. 3a of the Appendix to Respondents' Brief.

[17] The Petition [p.2] asserts jurisdiction under "28 United State Code Section 1257(3)", a statute which was amended and renumbered June 27, 1988, and is in any case inapplicable to

(Continued on following page)

Respondents received their service copy of the Petition by regular mail on June 13, 1989.

ARGUMENT: WHY THE PETITION SHOULD BE DENIED

Petitioner's arguments for granting the Writ can be categorized as follows:

First, Petitioner argues that the Court of Appeals, as a matter of *federal* law and procedure, incorrectly applied principles of preclusion articulated by this Court;

Second, Petitioner claims the Court of Appeals incorrectly apprehended and applied Kentucky *state* law insofar as the same essentially supplies the foundation for the kind of preclusion analysis applicable to this case; and

Third, Petitioner claims that the sum total of the *result* achieved in the course of his fitful odyssey though various state and federal *fora* is unfair and inequitable.

None of these arguments, nor the authorities advanced by Petitioner in support therefor, constitute the kind of " . . . special and important reasons, . . . " warranting review of this case; *Rule 17.1, Rules of the Supreme Court of the United States.*

(Continued from previous page)

cases in the Court of Appeals. Jurisdiction of this Court to review the Judgment of the Sixth Circuit Court of Appeals in this case is grounded, if at all, in Title 28, United States Code, Section 1254(1). This is apparently not an error fatal to the Petition; see e.g. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1978); *compare Haner v. United States*, 440 U.S. 1308, 1310(note) (1979).

At the threshold, the Court will not normally - as urged by Petitioner in this case - grant the Writ simply to review the lower court's treatment of evidence or specific facts, *United States v. Johnston*, 268 U.S. 220 (1925).

Likewise, where a particular controversy turns on an application of state law, its resolution by the lower federal courts will not be set aside except upon a showing of palpable and pernicious error - notably absent in this case, *In re Woods*, 143 U.S. 202 (1892); *Palmer v. Hoffman*, 318 U. S. 109, 118 (1943) *reh. den.* 318 U. S. 800 (1943); *Steele v. General Motors, Inc.*, 329 U.S. 433, 438-439 (1947), *reh. den.* 329 U.S. 834 (1947).

The District Court had before it not only the various findings and orders of the Merit Board, but the complete record of the Board's deliberations, including transcripts of the numerous hearings the Board held, both on the procedural and constitutional challenges Petitioner raised, and the substantive merits of Respondent Helm's charges against him.[18]

The Court of Appeals *also* had this record, *as well as* the District Court's specific findings and rulings, in reaching its opinion affirming the District Court.

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[18] The District Court also had in its record all the proceedings, however sparse, from the Jefferson Circuit Court action. The District Court ruled, and the Court of Appeals affirmed, that irrespective of the disposition of Petitioner's State Court Appeal from the Merit Board Findings, those Findings, standing alone, whether deemed "reviewed" or "unreviewed" by the Circuit Court, precluded further litigation of the same issues in the Federal forum.

The sufficiency, the logic, and the careful analyses reflected in these opinions is apparent, and will not be reargued here.[19]

Fundamentally, Petitioner's arguments rest on his characterization of the Merit Board as a " . . . low grade administrative agency . . . " without standing or authority to render any kind of preclusive adjudication, under Kentucky law or otherwise; Petition p. 19 and *passim*.[20]

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[19] Both the District Court, and the Court of Appeals found a substantial, if not complete identity of claims and issues raised before the Board, and in the federal court. This circumstance is amply supported by an examination of Petitioner's amended complaint, and the various Merit Board findings and orders [Appendix to Petition, pp 1a-9a, and 15a-21a.

[20] The dissent to the Court of Appeals order denying rehearing and rehearing en banc, facially, appears to brace Petitioner's arguments on this point. With all respect to Judge Wellford, an able and distinguished jurist, his attempted distinction between agency "factfinding" on the one hand, and its rendering of an "opinion" on the other, simply escapes comprehension. Further, an opinion of the Kentucky Court of Appeals cited in the dissent for the proposition that Kentucky administrative bodies are without authority to consider constitutional issues, has been stricken and is without any precedental utility whatsoever, generally or in this matter. The specific Court of Appeals opinion, *Lexington Herald-Leader Co. v. Revenue Cabinet* No. 86-CA-2196, was in fact rendered April 29, 1988, as an opinion "to be published". However, on August 30, 1988, the Supreme Court of Kentucky filed an Order granting review and directing the Court of Appeals opinion *not* to be published, No. 88-SC 364. On January 19, 1989 - two months before the dissent was filed - the Kentucky Supreme Court entered another Order, apparently by agreement, reversing the Court of Appeals Opinion, and dismissing the case in the

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There is simply no question that the general rule in Kentucky is, and has long been that quasi-judicial acts of public commissions and administrative boards such as the Jefferson County Police Merit Board, acting within their respective jurisdiction(s), are given the same preclusive effect as judgments of Courts having general judicial powers; see *Happy Coal Co. v. Hartbarger*, Ky., 65 S.W.2d 977 (1933).[21]

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Supreme Court. Rule 76.28(4)(c), Kentucky Rules of Civil Procedure, provides that unpublished opinions of Kentucky Appellate Courts " . . . shall not be cited or used as authority in any other case . . . "

[21] The Petitioner offers *Weaver v. Anderson County Fiscal Court* [D.C. Ky., 1986], 648 F.Supp. 1575, as standing for the proposition that acts of Kentucky administrative agencies are not really accorded the same preclusive effect as judicial decisions, citing *Greater Cincinnati Marine Service, Inc. v. City of Ludlow*, Ky., 602 S.W.2d 427 (1980). *Weaver* has been reversed without opinion, 838 F.2d 1216 [6th Cir. 2-11-88]. That circumstance notwithstanding, Petitioner's recitation of this case misses the mark. *Weaver* held that, under *Ludlow*, preclusive effect given to decisions of *one particular kind* of Kentucky administrative agency, a Board of Adjustment and Zoning Appeals, was " . . . more limited under Kentucky law than that given to those of other agencies" [648 F.Supp. 1579]. The decision held that specific findings of *that board*, although nominally entitled to preclusive effect, would not be accorded such because of the peculiar nature of the specific agency under Kentucky law as reflected in the *Ludlow* case. The administrative agency at issue in this case, the Jefferson County, Kentucky Police Merit Board is clearly not within the narrow exception *Ludlow* prys out of the general rule. Further, an unpublished opinion of the Court of Appeals filed August 18, 1987, *Young v. McDaniel*, No. 86-6268 [included in the Appendix to this Brief, pp 8a-9a] explicitly recognized the authority of the *same agency* to hear and adjudicate a First Amendment constitutional issue, and gave preclusive effect to the agency's disposition.

As the Court of Appeals opinion points out, Kentucky law in this regard is in keeping with quite familiar principles of claim or issue preclusion generally applicable in most jurisdictions.[22]

Both the District Court and the Court of Appeals correctly applied this aspect of preclusion analysis to the fundamental principles enunciated by this Court in *Allen v. McCurry*, 449 U.S. 90 (1980), *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), and *University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

Finally, the Respondents take particular issue with Petitioner's repeated assertions that he has been shortchanged or dealt with unfairly by the multiple administrative and judicial processes he has invoked. By any standard, the Petitioner has been accorded exhaustive consideration and review of his claims and arguments, and in every respect a full measure of justice.[23]

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[22] *Nelson v. Jefferson County*, supra, 863 F.2d at 18; Appendix to the Petition, p. 62a

[23] Petitioner's claims of "inequitable" treatment at the hands of the Courts suggest that the principles of fairness Petitioner argues run in only one direction. Respondents' answer this with a quote from one of the most prominent and highly respected jurists in Kentucky, or for that matter in the nation, former Kentucky Supreme Court Chief Justice John Palmore, writing in *Alexander Hamilton Life Insurance Company of America v. Lewis*, Ky., 550 S.W.2d 558 (1977):

> " 'Equity' is a broad term, allowing for as many different definitions as there are people who are familiar with it. Often overlooked, however, is the simple fact that both equity and equality are derived from the same word and

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Without complaint or rancor, the Respondents respectfully state and argue to this Court that it is time to end this litigation, at this point, by denying the Petition for Writ of Certiorari.

Neither the opinion of the District Court, nor the opinion of the Court of Appeals, nor the Petition for Writ of Certiorari pending before this Court, nor the extensive record in this case, reflect any reason for granting the Writ under this Court's own Rule 17.1.

CONCLUSION

For all the reasons, and upon the authorities cited and argued in this, their Brief in Opposition to the

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have much more in common than a similar sound. We think of equity as an implement of sympathy and compassion, but its real meaning is more akin to equality. What is fair for one must be fair for the other."

550 S.W.2d at 560.

Petition for Writ of Certiorari, the Respondents respectfully urge that the Petition ought to be denied.

July 13, 1989

Respectfully submitted,

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APPENDIX

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September 28, 1982

F. R. RADOLOVICH
EDWARD F. HARRINGTON, JR.
MARC H. LEVY

Certified Mail Number P 353 458 794

Jefferson County Police Merit Board
208 South Fifth Street, Suite 606
Louisville, Kentucky 40202

Attention: Ms. Jeanette Priebe, Acting Secretary

Re: Termination of Galen Nelson

Dear Ms. Priebe:

Pursuant to Rule 10.1(2) of the Jefferson County Police Merit Board on behalf of the referenced officer, we move as follows:

A. To dismiss the termination order of September 28, 1982 on the grounds of improper service, i.e., the officer has *not* been served and is presently a patient at Our Lady of Peace Hospital as the direct result of Chief Helm's and this department's harassment; that it is a retaliatory act for Officer Nelson's having filed suit in federal court on September 24, 1982; that it is violative of Officer Nelson's rights under the 5th and 14th Amendments to the United States Constitution; and that this Board is without jurisdiction herein due to Officer Nelson pending injunctive relief

hearing involving this Board which is set for October 13, 1982.

B. We appeal Chief Helm's decision to terminate Officer Nelson as being arbitrary, capricious and retaliatory in nature without any basis in law and/or fact. Additionally, his actions violated Officer Nelson's constitutional rights as guaranteed under the 1st, 3rd, 4th, 5th, 6th, 8th, and 14th Amendments and are without truth. There never were or have been violations of *any* of the Jefferson County Police Department Standard Operating Procedures except by officers of the department to include Cpt. Topp, Lt. Whelan and Sgts. Fuchs and Lampe.

We move for an immediate meeting with the Board to schedule subpoena and other discovery devices.

Very truly yours,

RADOLOVICH, HARRINGTON & LEVY, P.S.C.

/s/ F. R. Radolovich

NO. 87-6070

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GALEN NELSON, Plaintiff-Appellant, v. JEFFERSON COUNTY, KENTUCKY, ET AL., Defendants-Appellees	)	ORDER (Filed Mar. 14, 1989)

BEFORE: ENGEL, Chief Judge; BOGGS, Circuit Judges; and McRAE*, Senior U.S. District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Robert M. McRae, Jr. sitting by designation from the Western District of Tennessee

WELLFORD, Circuit Judge, **dissenting** from the denial to rehear en banc:

The court should have heard this case *en banc* because it involves an important issue that frequently confronts our court and federal district courts in this circuit. The question is whether the split decision of a civilian County Merit Board, which reviews police department decisions, on a federal constitutional violation claim has preclusive effect so that the outcome of a *pending* constitutional claim in federal court is controlled by that decision.

Petitioner Galen Nelson brought a civil action under 42 U.S.C. § 1983 against the Jefferson County, Kentucky Police Department and its officials alleging that the police department violated his federal constitutional rights during a departmental investigation that ultimately lead to his discharge. While the petitioner was serving as a county police officer, a departmental investigation was conducted to determine whether he had engaged in improper conduct. It was during the course of this investigation that Nelson filed suit in federal court alleging that the investigators had illegally searched his home and automobile in violation of the constitution. Four days after filing suit in federal court, Nelson was discharged. He then amended his complaint to include the discharge as a separate constitutional violation.

Nelson sought a review of his discharge by the County Merit Board. After a full evidentiary hearing, the Board by a split decision upheld the discharge and denied that any constitutional infractions had taken place.

The panel's decision relies on *University of Tennessee v. Elliot*, ___ U.S. ___, 106 S. Ct. 3220 (1986), which held only that "federal courts give preclusive effect to the factfinding of state administrative tribunals." *Id.* at 3226. It says nothing about *opinions* of state agencies on substantial federal constitutional issues. A seriously divided Supreme Court in *Elliot* was willing to give preclusive effect only to state agency *factfinding*, and held at the same time that such agency decisions were not entitled to such effect in Title VII proceedings. *Elliot*, then, is not authority for the decision in the instant case. *See also Perry v. Brakke*, 826 F.2d 740, 746 (8th Cir. 1987); *Weaver v. Anderson County Fiscal Court*, 648 F. Supp. 1575 (E.D. Ky. 1986).

Even assuming that *Tennessee v. Elliot* applies to previously litigated constitutional issues, the panel has not shown that each of the requisite conditions for the applicability of *Elliot* were met. As the panel acknowledges, *Elliot* gives preclusive effect to state administrative findings only if such findings would have preclusive effect under state law. The panel of this court which rendered the opinion in question cited *Barnes v. McDowell*, 647 F. Supp. 1307, 1311 (E.D. Ky), but that decision was changed in 661 F. Supp. 498 (1987). That case does not address the authority of a civilian review board to render final judgments on federal constitutional issues. Nelson, on the other hand, relies on a more directly applicable Kentucky decision that clearly answers this question in the negative. In *Lexington Herald-Leader Co. v. Revenue Cabinet*, No. 86-CA-2196-MR (Ky. Ct. of App. April 29, 1988), the court held that state law could not be interpreted to "relegate matters of *constitutional proportions* to the Tax Board for

resolution, nor could it without offending Section 28 of our Constitution . . . certainly a non-judicial body such as the Tax Board does not have the competence to deal with [constitutional] issues like those raised . . . " (emphasis added).

Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988), involved the bringing of a § 1983 action by a discharged employee in federal court after the rendering of a state agency decision and its affirmance on the merits by the Kentucky appellate courts. With respect to the constitutional claim made by Barnes, the court pointed out that "[w]hether the defendants' motivation for the discharge was unconstitutional simply was not an issue in the state judicial proceedings." *Id.* at 731. *Barnes* referred, in this respect, to *Wicker v. Board of Education*, 826 F.2d 442 (6th Cir. 1987), a case which fully supports the petitioner's position. *Wicker* held that a litigant who filed suit in federal court before the rendering of a state administrative decision retains the right to litigate his federal claims in federal court. *Id.* at 451. Nelson, of course, filed his lawsuit in federal court before *any* action was taken by the County Merit Board.

It is doubtful that the County Board in this case rendered an effectual decision on the constitutional issue. The Board stated that it was rejecting Nelson's constitutional claim, but gave no reasoned basis for a legal conclusion. Nothing in the record indicates that the Board had the power to act on the petitioner's constitutional claims of unlawful search and seizure. There is no indication, moreover, that a single member of the Jefferson County Merit Board had any legal training or experience.

For these reasons, I would have granted the petition for rehearing *en banc*, and I dissent from the court's refusal to consider the case *en banc*.

NO. 86-6268

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALEX F. YOUNG, Plaintiff-Appellant, v. RUSSELL S. McDANIEL, BREMER EHRLER, JEFFERSON COUNTY FISCAL COURT, JEFFERSON COUNTY POLICE MERIT BOARD, and UNKNOWN DEFENDANTS, Defendants-Appellees	)	*ORDER* (Filed Aug. 18, 1987) [NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

BEFORE: KEITH and NORRIS, Circuit Judges; and GIBBONS, District Judge.*

This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination of the record and the briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

Plaintiff, a former member of the Ku Klux Klan, was terminated from the Jefferson County, Kentucky, Police Department for, among other things, distributing "hate" literature abusive to black and Jewish persons to individuals who knew plaintiff as a police officer. Plaintiff appealed his termination to the Jefferson County Police Merit Board and raised a first amendment issue. A full

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* The Honorable Julia Gibbons, U.S. District Judge for the Western District of Tennessee, sitting by designation.

due process hearing was held and his termination was affirmed. Plaintiff then filed a complaint with the Jefferson Circuit Court alleging violations of the first and fourteenth amendments. The record indicates that, upon plaintiff's own motion, the circuit court later dismissed plaintiff's action with prejudice, which is a judgment on the merits for purposes of res judicata. *See Polk v. Wimsatt*, 689 S.W.2d 363, 364 (Ky. Ct. App. 1985). On that same day plaintiff filed his complaint in the district court alleging violations of the first and fourteenth amendments and adding two new defendants. The district court dismissed plaintiff's action, upon defendants' motion, and plaintiff appealed.

Pursuant to the doctrines of res judicata and collateral estoppel and 28 U.S.C. § 1738, as set forth in the district court opinion, we hereby affirm. Rule 9(b)(5), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: 9/10/87

COST: none

Supreme Court, U.S.
FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2040

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GALEN NELSON - - - - - - - Petitioner

versus

JEFFERSON COUNTY, KENTUCKY,
ADDISON MITCHELL McCONNELL,
EDGAR G. HELM, JR.,
KENNETH GRAHAM, CHARLES TOPP,
DAVID WHALIN, KENNETH LAMPE
and JAMES FUCHS - - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
Statement of the Case	1–5
Argument	5–8
Conclusion	9
Certificate of Service	9

TABLE OF AUTHORITIES

Cases: PAGE

Barnes v. *McDowell*, 848 F. 2d 725 (6th Cir., 1988) .. 7
In Re Potts, 142 F. 2d 883 (6th Cir., 1954) 5, 6, 7–8
In Re Woods, 143 U.S. 202 (1892) 8
Wicker v. *Board of Education*, 826 F. 2d. 442 (6th Cir., 1987) 7

Court Rules:

Rules of the Supreme Court of the United States 13 4
Rules of the Supreme Court of the United States 17.1(a) 9
Kentucky Rule of Civil Procedure 73.02(1) 3
Kentucky Rule of Civil Procedure 77.04(2) 3

No. 88-2040

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GALEN NELSON - - - - - *Petitioner*

v.

JEFFERSON COUNTY, KENTUCKY,
ADDISON MITCHELL MCCONNELL,
EDGAR G. HELM, JR.,
KENNETH GRAHAM, CHARLES TOPP,
DAVID WHALIN, KENNETH LAMPE,
and JAMES FUCHS - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner fails to see any good reason for Respondents' delving into the substantive facts of this case in the detail presented. As we have seen, the Court of Appeals in response to Respondents' interlocutory appeal concluded that, ". . . genuine issues of material fact exist as to whether the appellants [Respondents] committed the acts as alleged by Nelson," the Petitioner (Petitioner's original Brief for this Court, pp. 7, 53a-56a).

Nevertheless, some of the Respondents' factual assertions are so outrageous as to demand correction.

Petitioner did not refuse in writing to, ". . . submit a detailed written statement as to the specifics of how his uniform came to be damaged," (Respondents' Brief for this Court, p. 2) until the Respondents had rejected as inadequate five (5) written descriptions of these events tendered by the Petitioner!

Respondents were unsatisfied with each of these responses for the simple reason that they did not constitute confessions of wrong-doing by the Petitioner.

Petitioner never bragged that his uniform items were unservicable prior to filing a claim for reimbursement (Respondents' Brief, p. 3, footnote 2).

Petitioner never made any sort of serious threat on Respondent Edgar Helm, then Chief of the Jefferson County Police Department (Respondents' Brief, p. 3) and Respondents know this. After Petitioner's alleged threat, Helm assigned him to the department radio room, where he was in daily contact with Helm. Had Helm taken Petitioner's "threat" at all seriously, it hardly seems likely that he would have made such an apparently dangerous re-assignment of him.

Petitioner's performance as a county police officer was not "erratic" and he did not exhibit, ". . . aggressively hostile" attitudes toward anybody as a police officer (Respondents' Brief, p. 4). His county personnel file indicated a competent hardworking officer with a strong desire to help others. After Helm fired Petitioner, he eventually became a police officer for the

City of West Buechel. He has now served in this capacity for approximately three years.

Petitioner's counsel did not "blind-side" Respondents' counsel in the Jefferson Circuit Court, or engage in "ex-parte" conversations with the judge of the division of that Court to which Petitioner's "appeal" of the Merit Board actions was assigned. He notified counsel of his intention to apply for the latest Order of that Court and appeared at the Court's regularly scheduled motion hour to obtain it.

Furthermore, the Order of which the Respondents complain could be set aside at any time or appealed at any time by simply asking the Circuit Clerk to serve notice ot its entry or by filing a waiver of such service. Kentucky Rule of Civil Procedure 77.04(2) states that:

> The date of the notation on the docket of the service of notice or entry, or the date of filing a waiver if prior thereto, shall be the date of entry for the purpose of fixing the running of the time for appeal under Rule 73.02(1).

As Respondents' counsel pointed out in his brief, the Clerk never served him with notice of this Order (Respondents' Brief, pp. 8-9, footnote 11). If he had bothered to check, he would have discovered, not surprisingly, that the notation on the docket of service of notice or entry was missing meaning that the Order was not yet appealable. It is therefore simply untrue that Respondents', ". . . counsel had virtually no remedy in the state court by reason of Kentucky Civil Rule 77.04(a)," (Respondent's Brief, pp. 8-9, footnote 11).

The most outrageous "factual" assertion set forth in the Respondents' brief, however, is the one that:

> The District Court had before it not only the various findings and orders of the Merit Board, but the complete record of the Board's deliberations, including transcripts of the numerous hearings the Board held, both on the procedural and constitutional challenges Petitioner raised, and the substantive merits of Respondent Helm's charges against him.
>
> The Court of Appeals *also* had this record, as well as the District Court's specific findings and rulings, in reaching the opinion affirming the District Court (Respondents' Brief, p. 12, emphasis original).

The record in this case *does not include any transcripts of any Merit Board hearings,* including the Board's hearing "on the merits," of August 29 and 30, 1984.

It is appalling, of course, that the parties to this proceeding cannot agree on what is and is not in the record. The ability of the Petitioner to invoke Rule 13 of this Court, which the Clerk of the Court has informed him may not be used without express order of the Court, would have avoided this situation. In the meantime, the Petitioner is required to prove a negative.

That the transcripts of the Merit Board proceedings are not in the record of this case may be seen from the fact that neither the District Court nor the Court of Appeals ever cited to them in their opinions, that they are nowhere to be found in the Joint Appendix for the

Court of Appeals, that they are nowhere mentioned on the docket sheets of the District Court, and that the Respondents themselves do not cite once to them in their Brief. Of course, it may be argued that this latter fact proves nothing, since the Respondents cite only to the record of this case as it is included in the appendices to the briefs. However, it must be apparent that if there were transcripts in the record of this case to which the Respondents could cite, they would do so.

This is because the Respondents are obviously aware of the importance of the existence of Merit Board transcripts in the record of this case for the application of any sort of preclusion doctrines under Kentucky Law.

ARGUMENT

In the case of *In Re Potts,* 142 F. 2d 883, 889 (6th Circ., 1954), the United States Court of Appeals for the Sixth Circuit, applying Kentucky law, which is, if anything, more hostile to the application of preclusion doctrines now than in the 1950's (Petitioner's Brief, pp. 29a-31a), held that:

> In order to render a judgment conclusive, it must appear *by the record* of the prior suit that the particular matter sought to be precluded was necessarily tried or determined, that is that the judgment could not have been rendered without deciding the matter. . . In order to determine what matter has been decided in the preceeding action, the *entire record* therein is to be considered (emphasis added).

The application of this principle is simple. If there is a record of proceedings in a prior action that the proponents of a preclusion defense claim should bar a later action and the proponents fail to produce it in the later action, then their preclusion defense *must* fail. In the case at bar the Respondents failed to produce the complete record of the proceedings that they claimed led to orders that precluded Petitioner's federal Constitutional lawsuit. Unfortunately, the Courts below failed to apply the principle of *In Re Potts*, just as they failed to apply any of the other principles that make it so difficult to succeed with a plea of preclusion under Kentucky law.

Unfortunately, this situation has turned into a cruel joke. It is doubtful that even the Courts below would have fallen for Respondents' preclusion arguments had the Courts had access to the transcript of the Merit Board proceedings. This is because the transcripts would have conclusively shown that the Board's "observations" concerning Petitioner's Constitutional rights (Petitioner's original Brief, pp. 19a-20a) were purely gratuitous, i. e. made without any reference to any testimony or arguments of counsel whatsoever. Respondents' knowledge of the assistance that the Merit Board transcripts would give Petitioner's opposition to their preclusion claim no doubt accounted for the absence of these transcripts from the record of this case. Unfortunately for Petitioner, he believed that the Courts below would understand basic principles such as that set forth in *In Re Potts, supra,* (Peti-

tioner's original Brief, pp. 28a, 41a-42a, pp. 16-17). Otherwise *he* would have borne the considerable expense of making the transcripts of the Merit Board hearings available to the Courts below!

***** *****

Petitioner is thankful for two aspects of Respondents' brief.

One is its inclusion of the opinion of Sixth Circuit Judge Wellford dissenting from that Court's denial of Petitioner's request for an *en banc* rehearing (Respondents' Brief, pp. 4a-7a). Petitioner did not include this opinion in the appendix to his original Brief for this Court for the simple reason that neither of his attorneys below received a copy of it from the Clerk of the Court of Appeals for the Sixth Circuit or were otherwise aware of the existence of the opinion.

Judge Wellford's opinion supplements the Petitioner's arguments quite ably. Although it relies upon an unpublished opinion to support the proposition that Kentucky administrative agencies generally are not competent to determine Constitutional issues, this point is amply supported by published authority (Petitioner's original Brief, pp. 20-22).

Furthermore, Judge Wellford correctly pointed out that the law in the Sixth Circuit since *Barnes* v. *McDowell*, 848 F. 2d 725 (6th Circ., 1988) and *Wicker* v. *Board of Education*, 826 F. ld 442 (6th Circ., 1987) is that the filing of federal constitutional claims prior to state *court* (much less administrative agency!) adjudi-

cation of arguably similar claims in and of itself defeats preclusion defenses.

It is quite extraordinary for a judge of one of our federal courts to publicly dissent from a denial of *en banc* rehearing, a point that leads to the second aspect of Respondents' brief for which Petitioner is thankful.

This is the Respondents' having unearthed the legal principle that:

> . . . where a particular controversy turns on an application of state law, its resolution by the lower federal courts will not be set aside except upon a showing of palpable and pernicious error,

[Respondents' Brief, p. 12, citing *In Re Woods*, 143 U.S. 202 (1892) and other opinions].

Certainly the error of the Courts below in this case is about as palpable and pernicious as error ever is. It is palpable because it is obvious. No Kentucky court would tolerate or affirm the arguments of Respondent that the federal Courts involved in this case have adopted as if they were holy writ. It is pernicious because it extinguishes *Federal Constitutional* claims that the Courts below had already determined to be worthy of submission to a jury.

CONCLUSION

Once again, the Petitioner believes that this Court should grant his Petition because the Courts below have so far departed from the accepted and usual course of judicial proceedings as to require the intervention of this Court, Rule of the Supreme Court 17.1(a).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served true copies of this Brief upon William T. Warner, 621 West Main Street, Louisville, Ky. 40202 and N. Scott Lilly, 1000 Fiscal Court Building, Louisville, Ky. 40202, by mailing the same to them at their respective offices upon this the 24th day of August, 1989.

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